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THE

NEGOTIABLE INSTRUMENTS LAW

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FROM THE DRAFT PREPARED FOR THE COMMISSIONERS ON UNIFORMITY
OF LAWS, AND ENACTED IN ALABAMA, ALASKA, ARIZONA, ARKANSAS
COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA
FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS,
KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS,
MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NE-
BRASKA, NEW HAMPSHIRE, NEVADA, NEW JER-
SEY, NEW MEXICO, NEW YORK, NORTH
CAROLINA, NORTH DAKOTA, OHIO, OKLA-
HOMA, OREGON, PENNSYLVANIA,
RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA,
TENNESSEE, UTAH, VERMONT, VIRGINIA,
WASHINGTON, WEST VIRGINIA,
WISCONSIN AND WYOMING.

THE FULL TEXT OF THE LAW AS ENACTED,
WITH COPIOUS ANNOTATIONS.

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JOHN J. CRAWFORD,
OF THE NEW YORK BAR,
BY WHOM THE STATUTE WAS DRAWN.

FOURTH EDITION.

NEW YORK:
BAKER, VOORHIS AND COMPANY,
1916.

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DEC 28 1916

PREFACE TO FOURTH EDITION.

Since the third edition of this book was published in 1908 the Negotiable Instruments Law has been enacted in Alaska, Arkansas, Delaware, Indiana, Minnesota, New Hampshire, Oklahoma, South Carolina, South Dakota and Vermont, so that it is now in force throughout the United States, except in California, Georgia, Maine, Mississippi and Texas. Within the same time there have been a great many decisions under the Act, some of which are of great importance. These are cited in the notes appended to the various sections. The draftsman's original notes, as they appeared in the draft submitted to the commissioners on Uniform Laws, and which were intended to indicate the authority for the different provisions of the statute, have been retained, and appear, for the most part, under the headings "Rule at Common Law" or "Source of the Section." The English cases construing the Bills of Exchange Act are not cited, for the reason that, so far as they are important, the language which the English courts were called upon to construe, differs materially from that in the Negotiable Instruments Law, and any attempt to conform to those decisions would tend to defeat, rather than to insure, a uniform construction of the American statute. That this would be the effect will appear more clearly from the following statement taken from an address delivered by the late Lyman D. Brewster, who was for a number of years President of the Conference of Commissioners on Uniform Laws, and who was also a member of the sub-committee under whose direction the statute was prepared: "The framers of the English

Act had followed the form of the Continental Codes, especially the French Commercial Code and the German Bills of Exchange Act; that is to say, they dealt primarily with bills of exchange, and then applied those provisions, so far as they were applicable, to promissory notes, adding provisions which were peculiar to the latter class of instruments. The draftsman of the American Act deemed this form unsuitable to American conditions, where the use of bills of exchange is not so extensive as it is in Europe, and where most of the cases relate to other kinds of negotiable instruments; and he adopted a form of his own, which grouped together the provisions applicable to all kinds of negotiable instruments, and then collected, under separate articles, the provisions specially affecting the different classes. * * * This departure from the Continental form, together with the introduction of many statements of the law based entirely upon the American cases, required a considerable divergence from the English Act, and perhaps the resemblance between the English and American statutes is not so great as between the English statute and the German Bills of Exchange Act." From this it will be obvious that uniformity can be secured only by a close attention to the language of the Act, and to the decisions thereunder; and that a resort to cases in which another statute was construed would be very much like adopting the practice which formerly obtained in will cases, when the courts were too much disposed to determine the meaning of one will by what had been decided with respect to another will. But it is equally obvious that if uniformity is to be had, the courts of each State must notice the decisions made in other States; and as will be seen by a reference to the cases cited on pages 3, 4

and 5, the necessity for this has been generally recognized.

In the draft as originally prepared, and as submitted by the commissioners to the legislatures of the States, the act was divided into four titles as follows: 1. Negotiable Instruments in General; 2. Bills of Exchange; 3. Promissory Notes and Checks, and 4. General Provisions; and this arrangement has been preserved in many of the States. But in other States, as for example in New York, the titles were omitted, and this, of course, necessitated a renumbering of the articles. In some States, where the act has been carried into a revision of the statutes, the articles have been dispensed with. The sequence of the sections is the same in all of the States, except that in some States, as in New York, the general provisions have been placed at the beginning, while in most of the States these sections are put at the end. The section numbers vary greatly, but the number of any section as it is in any State, can be readily found by referring to the table of corresponding sections on page xiii. Under the heading "variant readings" the changes made in the statute in the different States are indicated. These, it will be observed, are not important, except in the States of Illinois and Wisconsin.

JOHN J. CRAWFORD.

30 Broad Street, New York, December 1st, 1915.

PREFACE TO THIRD EDITION.

Since the second edition of this book was published in 1902, the Negotiable Instruments Law has been enacted in the following States, viz.: Alabama, Arizona, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Ohio, West Virginia and Wyoming. In all but one of these, the language of the Act is the same as that in the New York statute, except in a few minor and unimportant particulars. The Illinois statute, however, contains some provisions materially different. These consist mainly of proposed amendments submitted to the Commissioners on Uniformity of Laws at their annual meeting in 1900, but which the Commissioners, by a unanimous vote, after a full report from a committee appointed to consider the subject, rejected as undesirable. In the six years that have elapsed since the publication of the second edition, the statute has been applied or construed in more than two hundred cases. All of these are cited in the present edition. The number of the sections vary in the different States, and for convenience of reference a table of corresponding sections has been added.

JOHN J. CRAWFORD.

30 Broad Street, New York, June 10, 1908.

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PREFACE TO SECOND EDITION.

When the first edition of this book was published, the Negotiable Instruments Law had been passed in four States, viz.: New York, Connecticut, Florida and Colorado. In the four years which have elapsed since then it has been enacted in Massachusetts, Rhode Island, Pennsylvania, Maryland, Virginia, North Carolina, Tennessee, Wisconsin, North Dakota, Utah, Oregon and Washington, and has also been adopted by Congress as the law of the District of Columbia. In most instances the law has been passed in the form proposed by the Commissioners on Uniformity of Laws; but in several States a few minor changes have been made. These are indicated in the notes to this edition. I have also endeavored to point out the changes made by the law in the different States, and have added to the notes citations to the decisions in all the States where the statute is now in force. It is somewhat notable that so few cases have arisen under the Act. The reported cases number only about a half dozen in all; and in most of these the court was required only to apply the act, and not to construe it. Perhaps nothing could better demonstrate that the practical working of the law has been satisfactory. As in the previous edition, the text is that of the New York Act. For the information of the profession outside of New York it may be stated that the hiatus in the section numbers does not indicate the omission of any sections, but is in accordance with the plan adopted in all the "General Laws" of this State.

JOHN J. CRAWFORD.

30 Broad Street, New York, February 1, 1902.

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PREFACE TO FIRST EDITION.

In 1895 the Conference of Commissioners on Uniformity of Laws, which met that year in Detroit, instructed the Committee on Commercial Law to have prepared a codification of the law relating to bills and notes. The matter was referred to a sub-committee consisting of Lyman D. Brewster of Connecticut, Henry C. Wilcox of New York and Frank Bergen of New Jersey; and I was employed by the sub-committee to draw the proposed law. When completed, the draft, with my notes, was submitted to the sub-committee, who printed it and sent copies to each member of the conference, and also to many prominent lawyers and law professors, and to several English judges and lawyers, with an invitation for suggestions and criticisms. The draft was submitted to the conference which met at Saratoga in August, 1896; and the Commissioners who were in attendance, being twenty-seven in all, and representing fourteen different States, went over it section by section, and made some amendments therein, most of which were such changes in the existing law as I had not felt at liberty to incorporate into the original draft. The draft as thus amended was adopted by the conference; and in such form it has been submitted to the legislatures of many of the States. It has been passed and has become a law in New York, Connecticut, Colorado and Florida. I am informed that the Commissioners on Uniformity of Laws will make special effort to have it adopted in many other States at the next session of their legislatures.

The text of the law as printed in this edition is that of the New York statute. This is precisely the same as that of the draft published by the Commissioners on Uniformity of Laws, and the statute as passed in Connecticut, Colorado and Florida, except that the section numbers have been changed, and section headings introduced, to conform the statute to the plan adopted by the Commissioners of Statutory Revision in their revision of the General Laws, and three sections, viz., 330, 331 and 332, relating to special matters heretofore embodied in other New York statutes, have been added.

In the course of the passage of the bill through the New York Legislature a number of errors were made in the engrossing and were not detected until too late to be corrected. I have indicated these by asterisks and foot-notes. Probably none of them are of such a character as to effect the meaning, since they are so obviously mistakes.

In submitting this edition of the statute to the public, I embrace this my first opportunity to publicly express my appreciation of the unvarying courtesy and consideration shown me by the Commissioners on Uniformity of Laws, and especially by those composing the sub-committee having the preparation of the bill in charge.

JOHN J. CRAWFORD.

30 Broad Street, New York, July 8, 1897.

TABLE OF CORRESPONDING SECTIONS.*

Com- mis- sioners' Draft	Ala.	Ariz.	Col.	Conn.	Fla.	Ida.	Ill.	Ind.	Kan.
1	4958	3304	5051	4171	2935	3458	1	9089a	5247
2	4959	3305	5052	4172	2936	3459	2	9089b	5248
3	4960	3306	5053	4173	2937	3460	3	9089c	5249
4	4961	3307	5054	4174	{2938 2939}	3461	4	9089d	5250
5	4962	3308	5055	4175	2939	3462	5	9089e	5251
6	4963	3309	5056	4176	2940	3463	6	9089f	5252
7	4964	3310	5057	4177	2941	3464	7	9089g	5253
8	4965	3311	5058	4178	2942	3465	8	9089h	5254
9	4966	3312	5059	4179	2943	3466	9	9089i	5255
10	4967	3313	5060	4180	2944	3467	10	9089j	5256
11	4968	3314	5061	4181	2945	3468	11	9089k	5257
12	4969	3315	5062	4182	2946	3469	12	9089l	5258
13	4970	3316	5063	4183	2947	3470	13	9089m	5259
14	4971	3317	5064	4184	2948	3471	14	9089n	5260
15	4972	3318	5065	4185	2949	3472	15	9089o	5261
16	4973	3319	5066	4186	2950	3473	16	9089p	5262
17	4974	3320	5067	4187	2951	3474	17	9089q	5263
18	4975	3321	5068	4188	2952	3475	18	9089r	5264
19	4976	3322	5069	4189	2953	3476	19	9089s	5265
20	4977	3323	5070	4190	2954	3477	20	9089t	5266
21	4978	3324	5071	4191	2955	3478	21	9089u	5267
22	4979	2325	5072	4192	2956	3479	22	9089v	5268
23	4980	2326	5073	4193	2957	3480	23	9089w	5269
24	4981	2327	5074	4194	2958	3481	24	9089x	5270
25	4982	2328	5075	4195	2959	3482	25	9089y	5271
26	4982	2329	5076	4196	2960	3483	26	9089z	5272
27	4982	2330	5077	4197	2961	3484	27	9089a1	5273
28	4983	3331	5078	4198	2962	3485	28	9089b1	5274
29	4984	3332	5079	4199	2963	3486	29	9089c1	5275
30	4985	3333	5080	4200	2964	3487	30	9089d1	5276
31	4986	3334	5081	4201	2965	3488	31	9089e1	5277
32	4987	3335	5082	4202	2966	3489	32	9089f1	5278
33	4988	3336	5083	4203	2967	3490	33	9089g1	5279
34	4989	3337	5084	4204	2968	3491	34	9089h1	5280
35	4990	3338	5085	4205	2969	3492	35	9089i1	5281
36	4991	3339	5086	4206	2970	3493	36	9089j1	5282
37	4992	3340	5087	4207	2971	3494	37	9089k1	5283
38	4993	3341	5088	4208	2972	3495	38	9089l1	5284
39	4994	3342	5089	4209	2973	3496	39	9089m1	5285
40	4995	3343	5090	4210	2974	3497	40	9089n1	5286
41	4996	3344	5091	4211	2975	3498	41	9089o1	5287
42	4997	3345	5092	4212	2976	3499	42	9089p1	5288
43	4998	3346	5093	4213	2977	3500	43	9089q1	5289

* For the numbers in other States, see pages xvii-xx and xxi-xxiv.

Com- mis- sioners' Draft	Ala.	Aris.	Col.	Conn.	Fla.	Ida.	Ill.	Ind.	Kan.
44	49CJ	3347	5094	4214	2978	3501	44	9089r1	5290
45	5000	3348	....	4215	2979	3502	45	9089a1	5291
46	5001	3349	5096	4216	2979	3503	46	9089t1	5292
47	5002	3350	5097	4217	2980	3504	47	9089u1	5293
48	5003	3351	5098	4218	2981	3505	48	9089v1	5294
49	5004	3352	5099	4219	2982	3506	49	9089w1	5295
50	5005	3353	5100	4220	2983	3507	50	9089x1	5296
51	5006	3354	5101	4221	2984	3508	51	9089y1	5297
52	5007	3355	5102	4222	2985	3509	52	9089a1	5298
53	5008	3356	5103	4223	2986	3510	53	9089a2	5299
54	5009	3357	5104	4224	2987	3511	54	9089b2	5300
55	5010	3358	5105	4225	2988	3512	55	9089c2	5301
56	5011	3359	5106	4226	2989	3513	56	9089d2	5302
57	5012	3360	5107	4227	2990	3514	57	9089e2	5303
58	5013	3361	5108	4228	2991	3515	58	9089f2	5304
59	5014	3362	5109	4229	2992	3516	59	9089g2	5305
60	5015	3363	5110	4230	2993	3517	60	9089h2	5306
61	5016	3364	5111	4231	2994	3518	61	9089i2	5307
62	5017	3365	5112	4232	2995	3519	62	9089j2	5308
63	5018	3366	5113	4233	2996	3520	63	9089k2	5309
64	5019	3367	5114	4234	2997	3521	64	9089l2	5310
65	5020	3368	5115	4235	2998	3522	65	9089m2	5311
66	5021	3369	5116	4236	2999	3523	66	9089n2	5312
67	5022	3370	5117	4237	3000	3524	67	9089o2	5313
68	5023	3371	5118	4238	3001	3525	68	9089p2	5314
69	5024	3372	5119	4239	3002	3526	69	9089q2	5315
70	5025	3373	5120	4240	3003	3527	70	9089r2	5316
71	5026	3374	5121	4241	3004	3528	71	9089s2	5317
72	5027	3375	5122	4242	3005	3529	72	9089t2	5318
73	5028	3376	5123	4243	3006	3530	73	9089u2	5319
74	5029	3377	5124	4244	3007	3531	74	9089v2	5320
75	5030	3378	5125	4245	3008	3532	75	9089w2	5321
76	5031	3379	5126	4246	3009	3533	76	9089x2	5322
77	5032	3380	5127	4247	3010	3534	77	9089y2	5323
78	5033	3381	5128	4248	3011	3535	78	9089a2	5324
79	5034	3382	5129	4249	3012	3536	79	9089a3	5325
80	5035	3383	5130	4250	3012	3537	80	9089b3	5326
81	5036	3384	5131	4251	3013	3538	81	9089c3	5327
82	5037	3385	5132	4252	3014	3539	82	9089d3	5328
83	5038	3386	5133	4253	3015	3540	83	9089e3	5329
84	5038	3387	5134	4254	3016	3541	84	9089f3	5330
85	5039	3388	5135	4255	3017	3542	85	9089g3	5331
86	5040	3389	5136	4256	3017	3543	86	9089h3	5332
87	5041	3390	5137	4257	3018	3544	...	9089i3	5333
88	5042	3391	5138	4258	3019	3545	87	9089j3	5334
89	5043	3392	5139	4259	3020	3546	88	9089k3	5335
90	5044	3393	5140	4260	3021	3547	89	9089l3	5336
91	5045	3394	5141	4261	3022	3548	90	9089m3	5337
92	5046	3395	5142	4262	3023	3549	91	9089n3	5338
93	5046	3396	5143	4263	3024	3550	92	9089o3	5339
94	5047	3397	5144	4264	3025	3551	93	9089p3	5340

* For the numbers in other States, see pages xvii-xx and xxi-xxiv.

TABLE OF CORRESPONDING SECTIONS.*

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Com- missioners' Draft	Ala.	Ariz.	Col.	Conn.	Fla.	Ida.	Ill.	Ind.	Kan.
95	5048	3398	5145	4265	3026	3552	94	9089q3	5341
96	5048	3399	5146	4268	3027	3553	95	9089r3	5342
97	5049	3400	5147	4267	3027	3554	96	9089s3	5343
98	5050	3401	5148	4268	3028	3555	97	9089t3	5344
99	5051	3402	5149	4269	3029	3556	98	9089u3	5345
100	5052	3403	5150	4270	3029	3557	99	9089v3	5346
101	5053	3404	5151	4271	3030	3558	100	9089w3	5347
102	5054	3405	5152	4272	3031	3559	101	9089x3	5348
103	5055	3406	5153	4273	3031	3560	102	9089y3	5349
104	5056	3407	5154	4274	3032	3561	103	9089z3	5350
105	5057	3408	5155	4275	3033	3562	104	9089a4	5351
106	5057	3409	5156	4276	3033	3563	105	9089b4	5352
107	5058	3410	5157	4277	3034	3564	106	9089c4	5353
108	5059	3411	5158	4278	3035	3565	107	9089d4	5354
109	5060	3412	5159	4279	3036	3566	108	9089e4	5355
110	5060	3413	5160	4280	3036	3567	109	9089f4	5356
111	5060	3414	5161	4281	3036	3568	110	9089g4	5357
112	5061	3415	5162	4282	3037	3569	111	9089h4	5358
113	5062	3416	5163	4283	3038	3570	112	9089i4	5359
114	5063	3417	5164	4284	3039	3571	113	9089j4	5360
115	5064	3418	5165	4285	3039	3572	114	9089k4	5361
116	5065	3419	5166	4286	3039	3573	115	9089l4	5362
117	5066	3420	5167	4287	3040	3574	116	9089m4	5363
118	5067	3421	5168	4288	3041	3575	117	9089n4	5364
119	5068	3422	5169	4289	3042	3576	118	9089o4	5365
120	5069	3423	5170	4290	3042	3577	119	9089p4	5366
121	5070	3424	5171	4291	3043	3578	120	9089q4	5367
122	5071	3425	5172	4292	3044	3579	121	9089r4	5368
123	5072	3426	5173	4293	3045	3580	122	9089s4	5369
124	5073	3427	5174	4294	3046	3581	123	9089t4	5370
125	5074	3428	5175	4295	3046	3582	124	9089u4	5371
126	5075	3429	5176	4296	3047	3583	125	9089v4	5372
127	5076	3430	5177	4297	3047	3584	126	9089w4	5373
128	5077	3431	5178	4298	3047	3585	127	9089x4	5374
129	5078	3432	5179	4299	3048	3586	128	9089y4	5375
130	5079	3433	5180	4300	3049	3587	129	9089z4	5376
131	5080	3434	5181	4301	3050	3588	130	9089a5	5377
132	5081	3435	5182	4302	3051	3589	131	9089b5	5378
133	5082	3436	5183	4303	3051	3590	132	9089c5	5379
134	5083	3437	5184	4304	3051	3591	133	9089d5	5380
135	5084	3438	5185	4305	3052	3592	134	9089e5	5381
136	5085	3439	5186	4306	3053	3593	135	9089f5	5382
137	5086	3440	5187	4307	3054	3594	136	9089g5	5383
138	5087	3441	5188	4308	3055	3595	...	9089h5	5384
139	5088	3442	5189	4309	3056	3596	138	9089i5	5385
140	5089	3443	5190	4310	3056	3597	139	9089j5	5386
141	5090	3444	5191	4311	3056	3598	140	9089k5	5387
142	5091	3445	5192	4312	3057	3599	141	9089l5	5388
143	5092	3446	5193	4313	3058	3600	142	9089m5	5389
144	5093	3447	5194	4314	3059	3601	143	9089n5	5390
145	5094	3448	5195	4315	3060	3602	144	9089o5	5391
146	5095	3449	5196	4316	3061	3603	145	9089p5	5392

* For the numbers in other States, see pages xvii-xx and xxi-xxiv.

Com- mis- sioners' Draft	Ala.	Ariz.	Col.	Conn.	Fla.	Ida.	Ill.	Ind.	Kan.
147	5095	3450	5197	4317	3062	3604	146	9089q5	5393
148	5095	3451	5198	4318	3062	3605	147	9089r5	5394
149	5097	3452	5199	4319	3063	3606	148	9089s5	5395
150	5098	3453	5200	4320	3063	3607	149	9089t5	5396
151	5099	3454	5201	4321	3064	3608	150	9089u5	5397
152	5100	3455	5203	4322	3065	3609	151	9089v5	5398
153	5101	3456	5204	4323	3066	3610	152	9089w5	5399
154	5102	3457	5205	4324	3066	3611	153	9089x5	5400
155	5103	3458	5206	4325	3067	3612	154	9089y5	5401
156	5104	3459	5207	4326	3067	3613	155	9089z5	5402
157	5105	3460	5208	4327	3068	3614	156	9089a6	5403
158	5106	3461	5209	4328	3069	3615	157	9089b6	5404
159	5107	3462	5210	4329	3070	3616	158	9089c6	5405
160	5108	3463	5211	4330	3071	3617	159	9089d6	5406
161	5109	3464	5212	4331	3073	3618	160	9089e6	5407
162	5110	3465	5213	4332	3074	3619	161	9089f6	5408
163	5111	3466	5214	4333	3075	3620	162	9089g6	5409
164	5112	3467	5215	4334	3076	3621	163	9089h6	5410
165	5113	3468	5216	4335	3076	3622	164	9089i6	5411
166	5114	3469	5217	4336	3077	3623	165	9089j6	5412
167	5115	3470	5218	4337	3078	3624	166	9089k6	5413
168	5116	3471	5219	4338	3079	3625	167	9089l6	5414
169	5117	3472	5220	4339	3080	3626	168	9089m6	5415
170	5118	3473	5221	4340	3081	3627	169	9089n6	5416
171	5119	3474	5221	4341	3082	3628	170	9089o6	5417
172	5120	3475	5222	4342	3082	3629	171	9089p6	5418
173	5120	3476	5223	4343	3083	3630	172	9089q6	5419
174	5121	3477	5224	4344	3084	3631	173	9089r6	4920
175	5122	3478	5225	4345	3085	3632	174	9089s6	4921
176	5123	3479	5226	4346	3086	3633	175	9089t6	5422
177	5124	3480	5227	4347	3086	3634	176	9089u6	5423
178	5125	3481	5228	4348	3087	3635	177	9089v6	5424
179	5126	3482	5229	4349	3088	3636	178	9089w6	5425
180	5127	3483	5230	4350	3089	3637	179	9089x6	5426
181	5128	3484	5231	4351	3090	3638	180	9089y6	5427
182	5129	3485	5232	4352	3091	3639	181	9089z6	5428
183	5130	3486	5233	4353	3092	3640	182	9089a7	5429
184	5031	3487	5234	4354	3093	3641	183	9089b7	5430
185	5032	3487	5235	4355	3094	3642	184	9089c7	5431
186	5033	3487	5236	4356	3095	3643	185	9089d7	5432
187	5034	3487	5237	4357	3096	3644	186	9089e7	5433
188	5035	3487	5238	4358	3097	3645	187	9089f7	5434
189	5036	3487	5239	4359	3098	3646	188	9089g7	5435
190	5037	....	5240	....	2934	3647	189	9089h7	5436
191	5038	3487	5241	4170	2934	3648	190	9089i7	5437
192	5039	3488	5242	4170	2934	3649	191	9089j7	5438
193	5040	3489	5243	4170	2934	3650	192	9089k7	5439
194	5041	3490	5244	4170	2934	3651	193	9089l7	5440
195	5042	....	5245	4170	....	3652	194	9089m7	5441
196	5043	3491	5246	4170	2934	3653	195	9089n7	5442
197	....	....	....	....	....	....	196	.....	....
198	....	....	....	....	....	....	...	.....	....

* For the numbers in other States, see pages xvii-xx and xxi-xxiv.

Com- missioners' Draft	Md.	Mass.	Mich.	Minn.	Mon.	Neb.	N. H.	N. Y.	N. C.
1	20	18	3	5813	5849	1	1	20	2151
2	21	19	4	5814	5850	2	2	21	2152
3	22	20	5	5815	5851	3	3	22	2153
4	23	21	6	5816	5852	4	4	23	2154
5	24	22	7	5817	5853	5	5	24	2155
6	25	23	8	5818	5854	6	6	25	2156
7	26	24	9	5819	5855	7	7	26	2157
8	27	25	10	5820	5856	8	8	27	2158
9	28	26	11	5821	5857	9	9	28	2159
10	29	27	12	5822	5858	10	10	29	2160
11	30	28	13	5823	5859	11	11	30	2161
12	31	29	14	5824	5860	12	12	31	2162
13	32	30	15	5825	5861	13	13	32	2163
14	33	31	16	5826	5862	14	14	33	2164
15	34	32	17	5827	5863	15	15	34	2165
16	35	33	18	5828	5864	16	16	35	2166
17	36	34	19	5829	5865	17	17	36	2341
18	37	35	20	5830	5866	18	18	37	2167
19	38	36	21	5831	5867	19	19	38	2168
20	39	37	22	5832	5868	20	20	39	2169
21	40	38	23	5833	5869	21	21	40	2170
22	41	39	24	5834	5870	22	22	41	2180
23	42	40	25	5835	5871	23	23	42	2171
24	43	41	26	5836	5872	24	24	50	2172
25	44	42	27	5837	5873	25	25	51	2173
26	45	43	28	5838	5874	26	26	52	2174
27	46	44	29	5839	5875	27	27	53	2175
28	47	45	30	5840	5876	28	28	54	2176
29	48	46	31	5841	5877	29	29	55	2177
30	49	47	32	5842	5878	30	30	60	2178
31	50	48	33	5843	5879	31	31	61	2179
32	51	49	34	5844	5880	32	32	62	2181
33	52	50	35	5845	5881	33	33	63	2182
34	53	51	36	5846	5882	34	34	64	2183
35	54	52	37	5847	5883	35	35	65	2184
36	55	53	38	5848	5884	36	36	66	2185
37	56	54	39	5849	5885	37	37	67	2186
38	57	55	40	5850	5886	38	38	68	2187
39	58	56	41	5851	5887	39	39	69	2188
40	59	57	42	5852	5888	40	40	70	2189
41	60	58	43	5853	5889	41	41	71	2190
42	61	59	44	5854	5890	42	42	72	2191
43	62	60	45	5855	5891	43	43	73	2192
44	63	61	46	5856	5892	44	44	74	2193
45	64	62	47	5857	5893	45	45	75	2194
46	65	63	48	5858	5894	46	46	76	2195
47	66	64	49	5859	5895	47	47	77	2196
48	67	65	50	5860	5896	48	48	78	2197
49	68	66	51	5861	5897	49	49	79	2198
50	69	67	52	5862	5898	50	50	80	2199

* For the numbers in other States, see pages xiii-xvi and xxi-xxiv.

Com- mis- sioners' Draft	Md.	Mass.	Mich.	Minn.	Mon.	Neb.	N. H.	N. Y.	N. C.
51	70	68	53	5863	5899	51	51	90	2200
52	71	69	54	5864	5900	52	52	91	2201
53	72	70	55	5865	5901	53	53	92	2202
54	73	71	56	5866	5902	54	54	93	2203
55	74	72	57	5867	5903	55	55	94	2204
56	75	73	58	5868	5904	56	56	95	2205
57	76	74	59	5869	5905	57	57	96	2206
58	77	75	60	5870	5906	58	58	97	2207
59	78	76	61	5871	5907	59	59	98	2208
60	79	77	62	5872	5908	60	60	110	2209
61	80	78	63	5873	5909	61	61	111	2210
62	81	79	64	5874	5910	62	62	112	2211
63	82	80	65	5875	5911	63	63	113	2212
64	83	81	66	5876	5912	64	64	114	2213
65	84	82	67	5877	5913	65	65	115	2214
66	85	83	68	5878	5914	66	66	116	2215
67	86	84	69	5879	5915	67	67	117	2216
68	87	85	70	5880	5916	68	68	118	2217
69	88	86	71	5881	5917	69	69	119	2218
70	89	87	72	5882	5918	70	70	130	2219
71	90	88	73	5883	5919	71	71	131	2220
72	91	89	74	5884	5920	72	72	132	2221
73	92	90	75	5885	5921	73	73	133	2222
74	93	91	76	5886	5922	74	74	134	2223
75	94	92	77	5887	5923	75	75	135	2224
76	95	93	78	5888	5924	76	76	136	2225
77	96	94	79	5889	5925	77	77	137	2226
78	97	95	80	5890	5926	78	78	138	2227
79	98	96	81	5891	5927	79	79	139	2228
80	99	97	82	5892	5928	80	80	140	2229
81	100	98	83	5893	5929	81	81	141	2230
82	101	99	84	5894	5930	82	82	142	2231
83	102	100	85	5895	5931	83	83	143	2232
84	103	101	86	5896	5932	84	84	144	2233
85	104	102	87	5897	5933	85	85	145	2234
86	105	103	88	5898	5934	86	86	146	2236
87	106	104	89	5899	5935	....	87	147	2237
88	107	105	90	5900	5936	87	88	148	2238
89	108	106	91	5901	5937	88	89	160	2239
90	109	107	92	5902	5938	89	90	161	2240
91	110	108	93	5903	5939	90	91	162	2241
92	111	109	94	5904	5940	91	92	163	2242
93	112	110	95	5905	5941	92	93	164	2243
94	113	111	96	5906	5942	93	94	165	2244
95	114	112	97	5907	5943	94	95	166	2245
96	115	113	98	5908	5944	95	96	167	2246
97	116	114	99	5909	5945	96	97	168	2247
98	117	115	100	5910	5946	97	98	169	2248
99	118	116	101	5911	5947	98	99	170	2249
100	119	117	102	5912	5948	99	100	171	2250

* For the numbers in other States, see pages xiii-xvi and xxi-xxiv.

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Com- mis- sioners' Draft	Md.	Mass.	Mich.	Minn.	Mon.	Neb.	N. H.	N. Y.	N. C.
101	120	118	103	5913	5949	100	101	172	2251
102	121	119	104	5914	5950	101	102	172	2252
103	122	120	105	5915	5951	102	103	174	2253
104	123	121	106	5916	5952	103	104	175	2254
105	124	122	107	5917	5953	104	105	176	3255
106	125	123	108	5918	5954	105	106	177	2256
107	126	124	109	5919	5955	106	107	178	2257
108	127	125	110	5920	5956	107	108	179	2258
109	128	126	111	5921	5957	108	109	180	2259
110	129	127	112	5922	5958	109	110	181	2260
111	130	128	113	5923	5959	110	111	182	2261
112	131	129	114	5924	5960	111	112	183	2262
113	132	130	115	5925	5961	112	113	184	2263
114	133	131	116	5926	5962	113	114	185	2264
115	134	132	117	5927	5963	114	115	186	2265
116	135	133	118	5928	5964	115	116	187	2266
117	136	134	119	5929	5965	116	117	188	2267
118	137	135	120	5930	5966	117	118	189	2268
119	138	136	121	5931	5967	118	119	200	2269
120	139	137	122	5932	5968	119	120	201	2270
121	140	138	123	5933	5969	120	121	202	2271
122	141	139	124	5934	5970	121	122	203	2272
123	142	140	125	5935	5971	122	123	204	2273
124	143	141	126	5936	5972	123	124	205	2274
125	144	142	127	5937	5973	124	125	206	2275
126	145	143	128	5938	5974	125	126	210	2276
127	146	144	129	5939	5975	126	127	211	2277
128	147	145	130	5940	5976	127	128	212	2278
129	148	146	131	5941	5977	128	129	213	2279
130	149	147	132	5942	5978	129	130	214	2280
131	150	148	133	5943	5979	130	131	215	2281
132	151	149	134	5944	5980	131	132	220	2282
133	152	150	135	5945	5981	132	133	221	2283
134	153	151	136	5946	5982	133	134	222	2284
135	154	152	137	5947	5983	134	135	223	2285
136	155	153	138	5948	5984	135	136	224	2286
137	156	154	139	5949	5985	136	137	225	2287
138	157	155	140	5950	5986	137	138	226	2288
139	158	156	141	5951	5987	138	139	227	2289
140	159	157	142	5952	5988	139	140	228	2290
141	160	158	143	5953	5989	140	141	229	2291
142	161	159	144	5954	5990	141	142	230	2292
143	162	160	145	5955	5991	142	143	240	2293
144	163	161	146	5956	5992	143	144	241	2294
145	164	162	147	5957	5993	144	145	242	2295
146	165	163	148	5958	5994	145	146	243	2296
147	166	164	149	5959	5995	146	147	244	2297
148	167	165	150	5960	5996	147	148	245	2298
149	168	166	151	5961	5997	148	149	246	2299

* For the numbers in other States, see pages xiii-xvi and xxi-xxiv.

Com- mis- sioners' Draft	Md.	Mass.	Mich.	Minn.	Mon.	Neb.	N. H.	N. Y.	N. C.
150	169	167	152	5962	5998	149	150	247	2300
151	170	168	153	5963	5999	150	151	248	2301
152	171	169	154	5964	6000	151	152	249	2302
153	172	170	155	5965	6001	152	153	250	2303
154	173	171	156	5966	6002	153	154	251	2304
155	174	172	157	5967	6003	154	155	252	2305
156	175	173	158	5968	6004	155	156	253	2306
157	176	174	159	5969	6005	156	157	254	2307
158	177	175	160	5970	6006	157	158	255	2308
159	178	176	161	5971	6007	158	159	256	2309
160	179	177	162	5972	6008	159	160	257	2310
161	180	178	163	5973	6009	160	161	258	2311
162	181	179	164	5974	6010	161	162	259	2312
163	182	180	165	5975	6011	162	163	260	2313
164	183	181	166	5976	6012	163	164	261	2314
165	184	182	167	5977	6013	164	165	262	2315
166	185	183	168	5978	6014	165	166	263	2316
167	186	184	169	5979	6015	166	167	264	2317
168	187	185	170	5980	6016	167	168	265	2318
169	188	186	171	5981	6017	168	169	266	2319
170	189	187	172	5982	6018	169	170	267	2320
171	190	188	173	5983	6019	170	171	268	2321
172	191	189	174	5984	6020	171	172	269	2322
173	192	190	175	5985	6021	172	173	270	2323
174	193	191	176	5986	6022	173	174	271	2324
175	194	192	177	5987	6023	174	175	272	2325
176	195	193	178	5988	6024	175	176	273	2326
177	196	194	179	5989	6025	176	177	274	2327
178	197	195	180	5990	6026	177	178	275	2328
179	198	196	181	5991	6027	178	179	276	2329
180	199	197	182	5992	6028	179	180	277	2330
181	200	198	183	5993	6029	180	181	278	2331
182	201	199	184	5994	6030	181	182	279	2332
183	202	200	185	5995	6031	182	183	280	2333
184	203	201	186	5996	6032	183	184	281	2334
185	204	202	187	5997	6033	184	185	282	2335
186	205	203	188	5998	6034	185	186	283	2336
187	206	204	189	5999	6035	186	187	284	2337
188	207	205	190	6000	6036	187	188	285	2338
189	208	206	191	6001	6037	188	189	286	2339
190	13	....	1	6002	5842	....	....	1	....
191	14	207	2	6003	5843	189	190	2	2340
192	15	208	2	6004	5844	190	191	3	2342
193	16	209	2	6005	5845	191	192	4	2343
194	17	210	2	6006	5846	192	193	5	....
195	18	211	2	6007	5847	193	194	6	2345
196	19	212	2	6008	5848	194	195	7	2344
197	19	....	....	6009	....	197	196	....	....
198	198	196

* For the numbers in other States, see pages xiii-xvi and xxi-xxiv.

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Com- mis- sioners' Draft	N. D.	Okl.	Ohio	Ore.	R. I.	S. D.	Tenn.	Utah	Wis.
1	6886	4044	3171	5834	7	1	1	1553	1675- 1
2	6887	4045	3171a	5835	8	2	2	1554	1675- 2
3	6888	4046	3171b	5836	9	3	3	1555	1675- 3
4	6889	4047	3171c	5837	10	4	4	1556	1675- 4
5	6890	4048	3171d	5838	11	5	5	1557	1675- 5
6	6891	4049	3171e	5839	12	6	6	1558	1675- 6
7	6892	4050	3171f	5840	13	7	7	1559	1675- 7
8	6893	4051	3171g	5841	14	8	8	1560	1675- 8
9	6894	4052	3171h	5842	15	9	9	1561	1675- 9
10	6895	4053	3171i	5843	16	10	10	1562	1675-10
11	6896	4054	3171j	5844	17	11	11	1563	1675-11
12	6897	4055	3171k	5845	18	12	12	1564	1675-12
13	6898	4056	3171l	5846	19	13	13	1565	1675-13
14	6899	4057	3171m	5847	20	14	14	1566	1675-14
15	6900	4058	3171n	5848	21	15	15	1567	1675-15
16	6901	4059	3171o	5849	22	16	16	1568	1675-16
17	6902	4060	3171p	5850	23	17	17	1569	1675-17
18	6903	4061	3171q	5851	24	18	18	1570	1675-18
19	6904	4062	3171r	5852	25	19	19	1571	1675-19
20	6905	4063	3171s	5853	26	20	20	1572	1675-20
21	6906	4064	3171t	5854	27	21	21	1573	1675-21
22	6907	4065	3171u	5855	28	22	22	1574	1675-22
23	6908	4066	3171v	5856	29	23	23	1575	1675-23
24	6909	4067	3171w	5857	30	24	24	1576	1675-24
25	6910	4068	3171x	5858	31	25	25	1577	1675-25
26	6911	4069	3171y	5859	32	26	26	1578	1675-26
27	6912	4070	3171z	5860	33	27	27	1579	1675-27
28	6913	4071	3172	5861	34	28	28	1580	1675-28
29	6914	4072	3172a	5862	35	29	29	1581	1675-29
30	6915	4073	3172b	5863	36	30	30	1582	1676
31	6916	4074	3172c	5864	37	31	31	1583	1676- 1
32	6917	4075	3172d	5865	38	32	32	1584	1676- 2
33	6918	4076	3172e	5866	39	33	33	1585	1676- 3
34	6919	4077	3172f	5867	40	34	34	1586	1676- 4
35	6920	4078	3172g	5868	41	35	35	1587	1676- 5
36	6921	4079	3172h	5869	42	36	36	1588	1676- 6
37	6922	4080	3172i	5870	43	37	37	1589	1676- 7
38	6923	4081	3172j	5871	44	38	38	1590	1676- 8
39	6924	4082	3172k	5872	45	39	39	1591	1676- 9
40	6925	4083	3172l	5873	46	40	40	1592	1676-10
41	6926	4084	3172m	5874	47	41	41	1593	1676-11
42	6927	4085	3172n	5875	48	42	42	1594	1676-12
43	6928	4086	3172o	5876	49	43	43	1595	1676-13
44	6929	4087	3172p	5877	50	44	44	1596	1676-14
45	6930	4088	3172q	5878	51	45	45	1597	1676-15
46	6931	4089	3172r	5879	52	46	46	1598	1676-16
47	6932	4090	3172s	5880	53	47	47	1599	1676-17
48	6933	4091	3172t	5881	54	48	48	1600	1676-18
49	6934	4092	3172u	5882	55	49	49	1601	1676-19
50	6935	4093	3172v	5883	56	50	50	1602	1676-20

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51	6936	4094	3172w	5884	57	51	51	1603	1676-21
52	6937	4095	3172x	5885	58	52	52	1604	1676-22
53	6938	4096	3172y	5886	59	53	53	1605	1676-23
54	6939	4097	3172z	5887	60	54	54	1606	1676-24
55	6940	4098	3173	5888	61	55	55	1607	1676-25
56	6941	4099	3173a	5889	62	56	56	1608	1676-26
57	6942	4100	3173b	5890	63	57	57	1609	1676-27
58	6943	4101	3173c	5891	64	58	58	1610	1676-28
59	6944	4102	3173d	5892	65	59	59	1611	1676-29
60	6945	4103	3173e	5893	66	60	60	1612	1677
61	6946	4104	3173f	5894	67	61	61	1613	1677- 1
62	6947	4105	3173g	5895	68	62	62	1614	1677- 2
63	6948	4106	3173h	5896	69	63	63	1615	1677- 3
64	6949	4107	3173i	5897	70	64	64	1616	1677- 4
65	6950	4108	3173j	5898	71	65	65	1617	1677- 5
66	6951	4109	3173k	5899	72	66	66	1618	1677- 6
67	6952	4110	3173l	5900	73	67	67	1619	1677- 7
68	6953	4111	3173m	5901	74	68	68	1620	1677- 8
69	6954	4112	3173n	5902	75	69	69	1621	1677- 9
70	6955	4113	3173o	5903	76	70	70	1622	1678
71	6956	4114	3173p	5904	77	71	71	1623	1678- 1
72	6957	4115	3173q	5905	78	72	72	1624	1678- 2
73	6958	4116	3173r	5906	79	73	73	1625	1678- 3
74	6959	4117	3173s	5907	80	74	74	1626	1678- 4
75	6960	4118	3173t	5908	81	75	75	1627	1678- 5
76	6961	4119	3173u	5909	82	76	76	1628	1678- 6
77	6962	4120	3173v	5910	83	77	77	1629	1678- 7
78	6963	4121	3173w	5911	84	78	78	1630	1678- 8
79	6964	4122	3173x	5912	85	79	79	1631	1678- 9
80	6965	4123	3173y	5913	86	80	80	1632	1678-10
81	6966	4124	3173z	5914	87	81	81	1633	1678-11
82	6967	4125	3174	5915	88	82	82	1634	1678-12
83	6968	4126	3174a	5916	89	83	83	1635	1678-13
84	6969	4127	3174b	5917	90	84	84	1636	1678-14
85	6970	4128	3174c	5918	91	85	85	1637	1678-15
86	6971	4129	3174d	5919	92	86	86	1638	1678-16
87	6972	4130	3174e	5920	93	..	87	1639	1678-17
88	6973	4131	3174f	5921	94	87	88	1640	1678-18
89	6974	4132	3174g	5922	95	88	89	1641	1678-19
90	6975	4133	3174h	5923	96	89	90	1642	1678-20
91	6976	4134	3174i	5924	97	90	91	1643	1678-21
92	6977	4135	3174j	5925	98	91	92	1644	1678-22
93	6978	4136	3174k	5926	99	92	93	1645	1678-23
94	6979	4137	3174l	5927	100	93	94	1646	1678-24
95	6980	4138	3174m	5928	101	94	95	1647	1678-25
96	6981	4139	3174n	5929	102	95	96	1648	1678-26
97	6982	4140	3174o	5930	103	96	97	1649	1678-27
98	6983	4141	3174p	5931	104	97	98	1650	1678-28
99	6984	4142	3174q	5932	105	98	99	1651	1678-29
100	6985	4143	3174r	5933	106	99	100	1652	1678-30

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102	6987	4145	3174t	5935	108	101	102	1654	1678-32
103	6988	4146	3174u	5936	109	102	103	1655	1678-33
104	6989	4147	3174v	5937	110	103	104	1656	1678-34
105	6990	4148	3174w	5938	111	104	105	1657	1678-35
106	6991	4149	3174x	5939	112	105	106	1658	1678-36
107	6992	4150	3174y	5940	113	106	107	1659	1678-37
108	6993	4151	3174z	5941	114	107	108	1660	1678-38
109	6994	4152	3175	5942	115	108	109	1661	1678-39
110	6995	4153	3175a	5943	116	109	110	1662	1678-40
111	6996	4154	3175b	5944	117	110	111	1663	1678-41
112	6997	4155	3175c	5945	118	111	112	1664	1678-42
113	6998	4156	3175d	5946	119	112	113	1665	1678-43
114	6999	4157	3175e	5947	120	113	114	1665x	1678-44
115	7000	4158	3175f	5948	121	114	115	1665x 1	1678-45
116	7001	4159	3175g	5949	122	115	116	1665x 2	1678-46
117	7002	4160	3175h	5950	123	116	117	1665x 3	1678-47
118	7003	4161	3175i	5951	124	117	118	1665x 4	1678-48
119	7004	4162	3175j	5952	125	118	119	1665x 5	1679
120	7005	4163	3175k	5953	126	119	120	1665x 6	1679- 1
121	7006	4164	3175l	5954	127	120	121	1665x 7	1679- 2
122	7007	4165	3275m	5955	128	121	122	1665x 8	1679- 3
123	7008	4166	3175n	5956	129	122	123	1665x 9	1679- 4
124	7009	4167	3175o	5957	130	123	124	1665x10	1679- 5
125	7010	4168	3175p	5958	131	124	125	1665x11	1679- 6
126	7011	4169	3175q	5959	132	125	126	1665x12	1680
127	7012	4170	3175r	5960	133	126	127	1665x13	1680-a
128	7013	4171	3175s	5961	134	127	128	1665x14	1680-b
129	7014	4172	3175t	5962	135	128	129	1665x15	1680-c
130	7015	4173	3175u	5963	136	129	130	1665x16	1680-d
131	7016	4174	3175v	5964	137	130	131	1665x17	1680-e
132	7017	4175	3175w	5965	138	131	132	1665x18	1680-f
133	7018	4176	3175x	5966	139	132	133	1665x19	1680-g
134	7019	4177	3175y	5967	140	133	134	1665x20	1680-h
135	7020	4178	3175z	5968	141	134	135	1665x21	1680-i
136	7021	4179	3176	5969	142	135	136	1665x22	1680-j
137	7022	4180	3176a	5970	143	...	137	1665x23	1680-k
138	7023	4181	3176b	5971	144	136	138	1665x24	1680-l
139	7024	4182	3176c	5972	145	137	139	1665x25	1680-m
140	7025	4183	3176d	5973	146	138	140	1665x26	1680-n
141	7026	4184	3176e	5974	147	139	141	1665x27	1680-o
142	7027	4185	3176f	5975	148	140	142	1665x28	1680-p
143	7028	4186	3176g	5976	149	141	143	1665x29	1681
144	7029	4187	3176h	5977	150	142	144	1665x30	1681- 1
145	7030	4188	3176i	5978	151	143	145	1665x31	1681- 2
146	7031	4189	3176j	5979	152	144	146	1665x32	1681- 3
147	7032	4190	3176k	5980	153	145	147	1665x33	1681- 4
148	7033	4191	3176l	5981	154	146	148	1665x34	1681- 5
149	7033a	4192	3176m	5982	155	147	149	1665x35	1681- 6

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150	7034	4193	3176n	5983	156	148	150	1665x36	1681- 7
151	7035	4194	3176o	5984	157	149	151	1665x37	1681- 8
152	7036	4195	3176p	5985	158	150	152	1665x38	1681- 9
153	7037	4196	3176q	5986	159	151	153	1665x39	1681-10
154	7038	4197	3176r	5987	160	152	154	1665x40	1681-11
155	7039	4198	3176s	5988	161	153	155	1665x41	1681-12
156	7040	4199	3176t	5989	162	154	156	1665x42	1681-13
157	7041	4200	3176u	5990	163	155	157	1665x43	1681-14
158	7042	4201	3176v	5991	164	156	158	1665x44	1681-15
159	7043	4202	3176w	5992	165	157	159	1665x45	1681-16
160	7044	4203	3176x	5993	166	158	160	1665x46	1681-17
161	7045	4204	3176y	5994	167	159	161	1665x47	1681-18
162	7046	4205	3176z	5995	168	160	162	1665x48	1681-19
163	7047	4206	3177	5996	169	161	163	1665x49	1681-20
164	7048	4207	3177a	5997	170	162	164	1665x50	1681-21
165	7049	4208	3177b	5998	171	163	165	1665x51	1681-22
166	7050	4209	3177c	5999	172	164	166	1665x52	1681-23
167	7051	4210	3177d	6000	173	165	167	1665x53	1681-24
168	7052	4211	3177e	6001	174	166	168	1665x54	1681-25
169	7053	4212	3177f	6002	175	167	169	1665x55	1681-26
170	7054	4213	3177g	6003	176	168	170	1665x56	1681-27
171	7055	4214	3177h	6004	177	169	171	1665x57	1681-28
172	7056	4215	3177i	6005	178	170	172	1665x58	1681-29
173	7057	4216	3177j	6006	179	171	173	1665x59	1681-30
174	7058	4217	3177k	6007	180	172	174	1665x60	1681-31
175	7059	4218	3177l	6008	181	173	175	1665x61	1681-32
176	7060	4219	3177m	6009	182	174	176	1665x62	1681-33
177	7061	4220	3177n	6010	183	175	177	1665x63	1681-34
178	7062	4221	3177o	6011	184	176	178	1665x64	1681-35
179	7063	4222	3177p	6012	185	177	179	1665x65	1681-36
180	7064	4223	3177q	6013	186	178	180	1665x66	1681-37
181	7065	4224	3177r	6014	187	179	181	1665x67	1681-38
182	7066	4225	3177s	6015	188	180	182	1665x68	1681-39
183	7067	4226	3177t	6016	189	181	183	1665x69	1681-40
184	7068	4227	3177u	6017	190	182	184	1665x70	1684
185	7069	4228	3177v	6018	191	183	185	1665x71	1684- 1
186	7070	4229	3177w	6019	192	184	186	1665x72	1684- 2
187	7071	4230	3177x	6020	193	185	187	1665x73	1684- 3
188	7072	4231	3177y	6021	194	186	188	1665x74	1684- 4
189	7073	4232	3177z	6022	195	187	189	1665x75	1684- 5
190	7074	4233	.....	6023	...	188	...	1665x76	.....
191	7075	4234	3178	6023	1	189	...	1665x77	1675
192	7076	4235	3178a	6023	2	190	...	1665x78	1675
193	7077	4236	3178b	6023	3	191	...	1665x79	1675
194	7078	4237	3178c	6023	4	192	...	1665x80	1675
195	7079	4238	3178d	6024	5	193	...	1665x81	1675
196	7080	4239	3178e	6025	6	194	...	1665x82	1675
197	196	1684- 7
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Note.—In Alaska, Arkansas, Delaware, Hawaii, Iowa, Louisiana, Nevada, New Jersey, New Mexico, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia and Wyoming, the numbers are the same as in the commissioners' draft. In Kentucky the act has been included in Carroll's Kentucky Statutes under the general heading of section 3720b, but the original numbers, which are the same as in the commissioners' draft, are preserved.

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- Nevada.**—Laws of 1907, ch. 62; Rev. Laws, 1912, I, p. 769.
- New Hampshire.**—Laws of 1909, ch. 123; Pub. Stat. Supp. 1913, p. 463.
- New Jersey.**—Laws of 1902, ch. 184; Comp. Stat. 1911, p. 3734.
- New Mexico.**—Laws of 1907, ch. 83.
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- North Carolina.**—Laws of 1899, ch. 733; Rev. 1905, ch. 54.
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- Utah.**—Laws of 1899, ch. 83; Comp. Laws, 1907, tit. 53, p. 629.
- Vermont.**—Laws of 1912, No. 99.
- Virginia.**—Laws of 1898, ch. 866; Laws of 1906, ch. 219; Code, 1904, ch. 133a, II, p. 1455.
- Washington.**—Laws of 1899, ch. 149; Rem. & Ball. Codes & Stats. 1909, II, p. 120.
- West Virginia.**—Acts of 1907, ch. 81; Code Anno. 1913, II, p. 1894.
- Wisconsin.**—Laws of 1899, ch. 356; Stat. 1913, p. 1180.
- Wyoming.**—Laws of 1905, ch. 43; Comp. Stat. 1910, ch. 210.

THE NEGOTIABLE INSTRUMENTS LAW

THE NEGOTIABLE INSTRUMENTS LAW

A general act relating to Negotiable Instruments (being an act to establish a law uniform with the laws of other States on that subject.)*

- Article
- I. General provisions. (§§ 190-196.)
 - II. Form and interpretation of negotiable instruments. (§§ 1-23.)
 - III. Consideration. (§§ 24-29.)
 - IV. Negotiation. (§§ 30-50.)
 - V. Rights of holder. (§§ 51-59.)
 - VI. Liabilities of parties. (§§ 60-69.)
 - VII. Presentment for payment. (§§ 70-88.)
 - VIII. Notice of dishonor. (§§ 89-118.)
 - IX. Discharge of negotiable instruments. (§§ 119-125.)
 - X. Bills of exchange; form and interpretation. (§§ 126-131.)
 - XI. Acceptance. (§§ 132-142.)
 - XII. Presentment for acceptance. (§§ 143-151.)
 - XIII. Protest. (§§ 152-160.)
 - XIV. Acceptance for honor. (§§ 161-170.)
 - XV. Payment for honor. (§§ 171-177.)
 - XVI. Bills in a set. (§§ 178-183.)
 - XVII. Promissory notes and checks. (§§ 184-189.)
 - XVIII. Notes given for patent rights and for a speculative consideration.
 - XIX. Laws repealed; when to take effect.

* This is the General Title proposed by the Commissioners on Uniformity of Laws, and used in many of the States. It has been held sufficiently comprehensive under a constitutional provision providing that no law shall embrace more than one subject to be expressed in the title. *Gilley v. Harrell*, 118 Tenn. 115.

ARTICLE I.

GENERAL PROVISIONS.*

Section 190. Short title.

191. Definitions and meaning of terms.

192. Primary and secondary liability.

193. Reasonable time—What constitutes.

194. When time for doing act falls on Sunday
or a holiday.

195. Instruments made prior to Act.

196. Cases not provided for in Act.

Section 190. Short title.—This act shall be known as the negotiable instruments law.

Variant readings.—In some states the words “ may be cited ” are substituted for “ shall be known.” In Arizona, Connecticut, District of Columbia, Kentucky, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Rhode Island, and Wisconsin the section is omitted. In some States the word “ uniform ” is inserted before the word “ negotiable.”

Application of the statute—Non-negotiable paper.—The law is confined to negotiable instruments. No attempt is made to deal with instruments which are non-negotiable; and they are not governed by the statute. In determining whether the rules of the statute will apply to any particular instrument, it is first necessary to ascertain whether such instrument is negotiable, according to the terms of the statute. In many instances the rules will be the same for instruments of either kind; but that is not because instruments which are non-negotiable are governed by the statute, but because the statute is a codification of common-law rules which before its adoption applied equally to both classes of instruments. In other words, a negotiable instrument is governed by the statute and a non-negotiable instrument by the rules of the common law, though frequently these rules will be the same. For example, if a note drawn payable at a bank contains terms

* In most of the States these general provisions are put at the end.

which render it non-negotiable, the provision of section 147, that "where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon," would not apply; but the case would be governed by the rule of the common law, which is the same as the statutory rule in some of the States, but different in others. This distinction must be carefully borne in mind, or much confusion will result. See *Windsor Cement Co. v. Thompson*, 86 Conn. 511; *Reynolds v. Vint*, 73 Ore. 528; *Johnson v. Lassiter*, 155 N. C. 47.

Municipal Bonds.—The statute applies to municipal bonds. *Borough of Montvale v. Peoples' Bank*, 74 N. J. L. 464.

Construction of the law.—For several years some of the courts were disposed to give the statute a narrow construction, and to limit the effect of the language whenever a literal reading would change the law of the State; and these courts, in construing the statute, treated it as if it were of purely local origin and concern. But the courts now very generally recognize that, as the law was different in the different States, an act intended to be uniform in all the States, must necessarily have changed local rules; and the tendency of late years has been to apply the language of the act according to its natural import, without regard to whether or not the effect would be to change the law of the state. Thus, the Supreme Court of Massachusetts, after observing that "it is matter of common knowledge that the Negotiable Instruments Act was adopted for the purpose of codifying the law upon the subject of negotiable instruments, and making it uniform throughout the country," said: "The language of the Act is to be construed with reference to the object to be attained. Its words are to be given their natural and common meaning, and the prevailing principles of statutory interpretation are to be applied. Care should be taken to adhere as closely as possible to the obvious meaning of the act without resort to that which had theretofore been the law of this commonwealth, unless necessary to dissipate obscurity or doubt, especially in instances where there is a difference in the law of the different states." *Union Trust Co. v. McGinty*, 212 Mass. 205. So, the Supreme Court of Wisconsin has said: "Such statute was enacted for the purpose of furnishing, in itself, a certain guide for the determi-

nation of all questions covered thereby relating to commercial paper, and, therefore, so far as it speaks without ambiguity as to any such question, reference to case law as it existed prior to the enactment is unnecessary and is liable to be misleading. The negotiable instruments law is not merely a legislative codification of judicial rules previously existing in this state, making that written law which was before unwritten. It is, so far as it goes, an incorporation into written law of the common law of the state, so to speak, the law merchant generally as recognized here, with such changes or modifications and additions as to make a system harmonizing, so far as practicable, with that prevailing in other states. That it contains some quite material changes in previous rules governing commercial paper we have had occasion heretofore to point out." *Columbian Banking Co. v. Bowen*, 134 Wis 218. So, in a late case, the Court of Appeals of Kentucky said: "The Negotiable Instruments Act was adopted by the several states for the purpose of establishing uniformity in the law regulating negotiable instruments. Where the act speaks, it controls and its meaning should be ascertained by interpreting the language used, and not by assuming that the common law on the subject should remain unaltered." *First State Bank v. Williams*, 164 Ky. 143. And so, the Supreme Court of Iowa has said that in construing the statute the court is to keep in mind that the primary object in adopting it was to establish a uniform law. And in a late case in New York it was said: "When the question arises under one of the uniform statutes relating to commercial paper which the courts of this state have not yet passed upon, it is the duty of trial courts, in the interest of a real uniformity in the application of such statutes, to adopt and follow the interpretations thereof made by the courts of other states." *Brown v. Brown*, 91 Misc. 220. To the same effect, see also *Century Bank v. Breitbart*, 89 Id. 308. See also *State Bank of Halstad v. Bilstad*, 162 Iowa, 433; *Rockfield v. First Nat. Bank of Springfield*, 77 Ohio St. 311; *Downey v. O'Keefe*, 26 R. I. 571; *Thorpe v. White*, 188 Mass. 333; *Toole v. Crafts*, 193 Mass. 110; *Hartington Nat. Bank v. Breslin*, 88 Neb. 47; *Ex parte Goldberg & Lewis*, 67 So. Rep. (Ala.) 839; *Windsor Cement Co. v. Thompson*, 86 Conn. 511; *B. & O. R. R. Co. v. First Nat. Bank*, 102 Va. 753; *Vander Ploeg v. Van Zuuk*, 35 Iowa, 350; *Holliday State Bank v. Hoffman*, 85 Kans. 71; *First Nat. Bank v. Miller*, 139 Wis. 126; *Cherokee Nat. Bank v. Union Trust Co.*, 33 Okla. 342; *Baumeister v. Kuntz*,

53 Fla. 340; *Farquhar Co. v. Higham*, 16 N. D. 106; *McCarthy v. Kepreta*, 24 N. D. 395; *Lightner v. Roach*, 95 Atl. Rep. (Md.) 62; *First Nat. Bank v. Meyer*, 152 N. W. Rep. (N. D.) 657; *Trustees of Am. Bank v. McComb*, 105 Va. 473; *Payne v. Zell*, 98 Va. 249; *American Trust Co. v. Canevin*, 184 Fed. Rep. 657. And as the statute was adopted for the purpose of producing uniformity, the courts, in construing it, seek to aid that purpose. See cases cited above.

Enactment in other states—Judicial notice.—But though the courts in construing the act take cognizance of the fact that it has been adopted in other states, yet, in a case arising under the laws of another state, the court will not take judicial notice that it has been enacted in that state; but, in the absence of evidence upon the subject, will presume that the law of such state is the same as the common law before the enactment. *Demelman v. Brazier*, 193 Mass. 589. Hence, the adoption of the statute in the state where the cause of action arose must, where the action is brought in another state, be proved as a fact. But see *Gleason v. Thayer*, 87 Conn. 248, 251.

Rule in Federal court.—While doubt has sometimes been expressed as to how far the Federal courts would be bound by the statute, the question appears to be simple enough upon principle. A man making, or drawing, or indorsing a negotiable instrument does so with respect to the law as it exists at the time. If there is no statute on the subject, then the contract is made with reference to the law merchant, and as to what this law is the Federal courts are not bound by the decisions of the State courts. But where the law under which the parties contract is statutory, then it is the statute, and not the law merchant, by which the contract is to be governed; and the Federal court in such case has not to determine what the law is, but has merely to apply the statute. Hence, it has been held that though the Federal court is not bound to follow the view expressed by the highest court of the state as to any rule of the law merchant, yet where the state has enacted the Negotiable Instruments Law, and its provisions are applicable, the Federal court is bound to give effect to the statute. *Smith v. Nelson Land & Cattle Co.*, 212 Fed. Rep. 56. And in *Schmidt v. Bank of Commerce*, 234 U. S. 64, the Supreme Court appears to have assumed that the statute would apply.

§ 191. Definitions and meaning of terms.—In this act, unless the context otherwise requires:

“Acceptance ” means an acceptance completed by delivery or notification.

“Action ” includes counter-claim and set-off.

“Bank ” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer ” means the person in possession of a bill or note which is payable to bearer.

“Bill ” means bill of exchange, and “note ” means negotiable promissory note.

“Delivery ” means transfer of possession, actual or constructive, from one person to another.

“Holder ” means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

“Indorsement ” means an indorsement completed by delivery.

“Instrument ” means negotiable instrument.

“Issue ” means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

“Person ” includes a body of persons, whether incorporated or not.

“Value ” means valuable consideration.

“Written ” includes printed, and “writing ” includes print.

§ 192. Primary and secondary liability.—The person “primarily” liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are “secondarily ” liable.

Variant readings.—In Kansas the last sentence of this section is omitted.

Construction of section.—This section is to be construed in connection with section 18, which provides that “no person is liable on the instrument whose signature does not appear thereon;” and also with section 127, which provides that “the drawee is not liable on the bill unless and until he accepts the same;” and with section 189, which provides that “the bank is not liable to the holder unless and until it accepts or certifies the check.” These are not, by the terms of the instrument, absolutely required to pay the same until such acceptance or certification. In *Rouse v. Wooten* (140 N. C. 557, 558), it was said: “A surety comes squarely within the definition of a person whose liability is primary, for he is by the terms of the instrument absolutely required to pay the same.” But obviously this would not be so in the case of one signing as “guarantor,” since he is liable only where there is default by the party whose obligation he has guaranteed.

Accommodation maker.—The question whether a party is “primarily” or “secondarily” liable is to be determined by his relation to the paper itself, and not by his agreement with some other party; and hence the maker is “primarily” liable, even though he has signed for the accommodation of the indorser. See note to section 120, and cases there cited.

§ 193. Reasonable time — what constitutes.—In determining what is a “reasonable time” or an “unreasonable time,” regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

Whether question one of law or fact.—Where the facts are doubtful or disputed, the question of reasonable time is a mixed question of law and fact. But when the facts are clear and undisputed, the question is one of law for the court. *Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 310; *German Am. Bank v. Mills*, 99 App. Div. (N. Y.) 312; *Prescott Bank v. Coverly*, 7 Gray, 217; *Gilmore v. Wilbur*, 12 Pick. 124; *Holbrook v. Burt*, 22 Pick. 555; *Northwestern Coal Co. v. Bowman*, 69 Iowa, 153; *Aymar v. Beers*, 7 Cow. 705; *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 273. See note to section 131.

§ 194. When time for doing act falls on Sunday or holiday.—Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

Variant readings.—In North Carolina this section is omitted.

Origin of section.—This section was adapted from sections 26 and 27 of the New York Statutory Construction Law.

§ 195. Instruments made prior to act.—The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

Variant readings.—This section is omitted in Arizona and Florida. In Minnesota the following is added at the end of the section: "Nor shall they be construed as modifying, repealing or superseding any of the terms and provisions of section 2747, Revised Laws, 1905." In South Dakota the section reads: "Nothing in this Act contained shall be construed as in any manner repealing chapters 128, 140 and 141 of the Laws of 1905, and chapter 74 of the Laws of 1907."

Time when statute took effect.—As to when the act took effect in the different states, see *Walker v. Dunham*, 135 Mo. App. 396; *Gate City Bank v. Schmidt*, 168 Mo. App. 153; *First Nat. Bank v. Bertoli*, 88 Vt. 421; *Dorsey v. Wellman*, 85 Neb. 262; *Dotson v. Owsley*, 141 Ky. 452; *Fassler v. Streit*, 92 Neb. 786.

Paper made before, and indorsed after, act took effect.—Where paper was made and delivered prior to the adoption of the act, the liability of indorsers thereon is to be determined by the law as it existed then, though such indorsements were made after the date on which the act was to go into effect. *Mackintosh v. Gibbs*, 81 N. J. L. 37; *Gate City Nat. Bank v. Schmidt*, 168 Mo. App. 153.

§ 196. Cases not provided for in act.—In any case not provided for in this act the rules of the law merchant shall govern.

Variant readings.—In many of the states the section reads: “The rules of law and equity, including the law merchant.” But just what this means might be difficult to determine. Of course, if the statute does not apply, the rules of law and equity must govern. But what rules? The Law Merchant is a distinct branch of law, and under it certain rules have grown up; and, hence, when we speak of the rules of the law merchant, we convey the idea of a definite set of rules. But when we speak of “the rules of law and equity including the law merchant,” we mean—if we mean anything at all—the whole body of the law, and the vagueness of the statement obscures and confuses. For a lucid exposition of this subject, see the report of the Committee on Uniformity of Judicial Decisions in Cases arising under Uniform Laws. Proceedings Twenty-Fourth Conference (1914), p. 244.

Prior statutes.—It is to be observed that the rules governing in such cases are not those which existed by virtue of a statute. In most of the states all prior statutes upon the subject of bills and notes are repealed; and where a case arises which is not provided for in the Negotiable Instruments Law, it is not to be determined by resort to any of the former statutes, but by reference to the rules of the law merchant. In a few of the states, however, certain statutes are expressly excepted from the effect of the repealing clause. These are indicated in the notes.

ARTICLE II.

FORM AND INTERPRETATION

- Section
1. Requirements in general.
 2. When sum payable is certain.
 3. When promise is unconditional.
 4. Determinable future time; what constitutes.
 5. Provisions which do not impair negotiability.
 6. Matters not affecting validity, etc.
 7. When payable on demand.
 8. When payable to order.
 9. When payable to bearer.
 10. What terms sufficient.
 11. Presumption as to date.
 12. Ante-dated and post-dated.
 13. When date may be inserted.
 14. Filling blanks—rights of holder.
 15. Incomplete instrument not delivered.
 16. Necessity for delivery—presumption.
 17. Construction where instrument is ambiguous.
 18. Only person signing liable—trade name.
 19. Signature by agent—authority—how shown.
 20. Signature on behalf of principal.
 21. Signature by procuration—effect of.
 22. Indorsement by infant or corporation.
 23. Forged signature inoperative—estoppel.

§ 1. Requirements to which instrument must conform.—An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to order, or to bearer; and
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

Variant readings.—In Arizona, Idaho, Iowa, Kentucky, North Carolina and Wyoming subdivision four reads as follows: "Must be payable to the order of a specified person or bearer." But the words "specified person" are surplusage, since by section 8 this is declared to be the effect of the term "order." In Wisconsin a provision is added to subdivision five as follows: "But no order drawn upon or accepted by the treasurer of any county, town, city, village or school district, whether drawn by any officer thereof or any other person, and no obligation nor instrument made by any such corporation, or any officer thereof, unless expressly authorized by law to be made negotiable, shall be, or shall be deemed to be, negotiable according to the custom of merchants, in whatever form they may be drawn or made. Warehouse receipts, bills of lading and railroad receipts upon the face of which the words 'not negotiable' shall not be plainly written, printed or stamped, shall be negotiable as provided in section 1676 of the Wisconsin Statutes of 1878, and in sections 4194 and 4425 of these statutes, as the same have been construed by the Supreme Court."

Form of writing.—It is not necessary that the instrument or any of the signatures thereto should be in ink; but the writing may be in pencil. *Geary v. Physic*, 5 Barn. & Cress. 234; *Brown v. Butchers' & Drovers' Bank*, 6 Hill 443. And one may become a party to the paper by any mark or designation he chooses to adopt,

provided it be used as a substitution for his name, and he intend to bind himself. *Baker v. Dening*, 8 Adol. & Ellis, 94; *Brown v. Butchers' & Drovers' Bank* (supra). In the case last cited the indorsement was made with a lead pencil, and in figures thus, "1, 2, 8," no name being written; and it was held that, the jury having found that the figures were made by B as a substitution for his proper name, intending to be bound thereby, he was liable.

Proof of signature.—The signature may be proven by the testimony of one who saw it placed there, or by the testimony of those who are familiar with the handwriting of the person whose signature it purports to be, or who have seen him write and know his signature, or it may be proven by the testimony of experts, by comparison, or by comparison by the jury, with writing proved to be genuine. *In re Estate of Chismore*, 166 Iowa, 217.

Instruments payable otherwise than in money.—The rule of the law merchant that the instrument must be payable in money, prevailed in most of the states. But in some states—as, for example, in Georgia—certain instruments are declared by statute to be negotiable, though they provide that payment is to be made in goods or merchandise. See also section 6, subdivision 5. In New York warehouse receipts issued by certain corporations are declared to be negotiable. See *Hanover Nat. Bank v. American Dock and Trust Co.*, 148 N. Y. 612; *Corn Exchange Bank v. Same*, 149 N. Y. 174. The act does not repeal these statutes. An instrument which, by its true construction is an unconditional order to pay a certain sum of money at a fixed future time, to the payee or order, is a bill of exchange under the terms of the statute. *Torpey v. Tebo*, 184 Mass. 307.

Instruments not payable to order or bearer.—By the law merchant an instrument payable to a particular person and not to his order or to bearer was not negotiable. *Backus v. Danforth*, 10 Conn. 297. As to bonds payable to bearer and coupons, see *Carr v. Leferre*, 27 Pa. St. 413; *County of Beaver v. Armstrong*, 44 Pa. St. 63; *Nat. Exchange Bank v. Hartford, etc., R. R. Co.*, 8 R. I. 375. As to Treasury notes, see *Frazer v. D'Quillers*, 2 Pa. St. 200. See section 9. An instrument which is not payable to order or bearer is not within the terms of the statute. *Owen v. Blackburn*, 161 App. Div. (N. Y.) 827; *Kerr v. Smith*, 156 Id. 807; *Hilborn v. Pennsylvania Cement Co.*, 145 Id. 422; *Westberg v.*

Chicago L. & C. Co., 117 Wis. 589. In Tennessee the Act has repealed Shannon's Code, § 3506, providing that every note, whether payable to order or not, shall be negotiable in the same manner as promissory notes. Gilley v. Harrell, 118 Tenn. 115.

Uncertainty as to amount.—The negotiable character of a note is destroyed by a provision therein reciting that if the maker allow the taxes or any other public rates and assessments on the mortgaged property to become delinquent, or in case any taxes or assessments shall be levied against the holder on account of the note, then the whole amount secured shall become due and payable and the mortgagee may at once proceed to collect the note and foreclose the mortgage given to secure the same, since there is an implication that the maker of the note is charged with the payment of the taxes, etc., the amount of which is uncertain. Bright v. Offield, 81 Wash. 442. But a promissory note is not rendered non-negotiable by the insertion of the following provision: "A discount of 6 per cent. will be allowed if paid in full within fifteen days from date." Farmers' Loan & Trust Co. v. Planck, 152 N. W. Rep. (Neb.) 390. See note to section 2.

Words "without defalcation."—The words "without defalcation," sometimes used in notes and bills, add nothing whatever to the force and effect of the instrument, either before or after maturity, and are mere surplusage. First Nat. Bank v. Lewis, 57 Colo. 125, 131. In this case the court said: "These words are nothing more than a relic of pronounced antiquity in the law, a mere remnant of common-law forms, and wholly without meaning in the light of modern usage under the practically uniform provisions of the Negotiable Instruments Law now in force in this and many other states."

§ 2. When sum payable is a sum certain.—The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or
2. By stated instalments; or
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest the whole shall become due; or

4. With exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

Variant readings.—In Idaho, Iowa, North Carolina and Wyoming, the words "or of interest" in subdivision three are omitted. In Nebraska a proviso is added to subdivision five as follows: "Provided, that nothing herein contained shall be construed to authorize any court to include in any judgment on an instrument made in this state any sum for attorney's fees or other costs not allowable in other cases." In North Carolina an additional section is added as follows: "Nothing in this chapter shall authorize the enforcement of an authorization to confess judgment or a waiver of homestead and personal property exemptions or a provision to pay counsel fees for collection incorporated in any of the instruments mentioned in this chapter; but the mention of such provision in such instrument shall not affect the other terms of such instruments or the negotiability thereof." Revisal of 1905, section 2346. In South Dakota the following is substituted for subdivision five: "Provided, that nothing herein contained shall be construed to authorize any court to include in any judgment or an instrument made in this state any sum for attorney's fees, or other costs not now taxable by law."

Payment by installments.—Promissory notes are not infrequently made payable in this way, and the negotiable character of a note so payable was well established. *Markey v. Casey*, 108 Mich. 184; *Wright v. Irwin*, 33 Mich. 32. In this case the note was for \$1500, to be paid twenty per cent. a month from the 1st of July, 1871. For cases arising under subdivision three, see *Hodge v. Wallace*, 129 Wis. 84; *Bright v. Offield*, 81 Wash. 442.

Payment of exchange.—The rule prescribed in the statute is that adopted by most of the courts which had passed upon this point. See *Second National Bank of Aurora v. Basuier*, 65 Fed. Rep. 58; *Hastings v. Thompson*, 54 Minn. 184; *Flagg v. School District*, 4 N. D. 30; *Whittle v. Fond du Lac National Bank (Tex.)*, 26 S. W. Rep. 1106. *Contra*, *Culbertson v. Nelson*, 93 Iowa, 187.

Stipulation for Attorney's Fees.—On the question whether a stipulation for an attorney's fee rendered the paper non-negoti-

able, there was much conflict in the decisions. The rule adopted in the Act is the one sustained by the weight of authority. It is supported by *National Bank v. Sutton Mfg. Co.*, 6 U. S. App. 312, 331; *Oppenheimer v. Farmers' and Merchants' Bank*, 97 Tenn. 19; *Montgomery v. Crossthwait*, 90 Ala. 553; *Trader v. Chichester*, 41 Ark. 242; *Stapleton v. Louisville Banking Co.*, 95 Ga. 802; *Dorsey v. Wolff*, 142 Ill. 589; *Stoneman v. Pyle*, 35 Ind. 103; *Shenandoah Nat. Bank v. Marsh*, 89 Iowa 173; *Benn v. Kutzschan*, 24 Oregon 28; *Seaton v. Scoville*, 18 Kans. 433; *Dietrich v. Boyle*, 23 La. Ann. 767; *Second National Bank v. Anglin*, 6 Wash. 403; *Heard v. Dubuque Bank*, 8 Neb. 10; *Stark v. Olsen*, 44 Neb. 646. The courts which adopted this rule took the view that so long as the amount payable is certain up to the time of maturity and dishonor, it is not essential that after that time, when the instrument has become non-negotiable for other reasons, the certainty as to the amount should continue. In the Tennessee case above cited the court said: "Upon a careful review of the authorities, we can perceive no reason why a note otherwise imbued with all the attributes of negotiability is rendered non-negotiable by a stipulation which is entirely inoperative until after the maturity of the note and its dishonor by the maker. The amount to be paid is certain during the currency of the note as a negotiable instrument, and it only becomes uncertain after it ceases to be negotiable by the default of the maker in its payment. It is eminently just that the creditor who has incurred an expense in the collection of the debt should be reimbursed by the debtor by whom the action was rendered necessary, and the expense entailed." The statute has changed the law in Maryland (*Maryland Fertilizing Co. v. Newman*, 60 Md. 584); North Carolina (*First National Bank v. Bynum*, 84 N. C. 24); Pennsylvania (*Woods v. North*, 84 Pa. St. 407); Oklahoma (*American Nat. Bank v. Halsell*, 43 Okl. 126). See also *Jones v. Rodetz*, 27 Minn. 240; *First Nat. Bank v. Gay*, 63 Mo. 38; *First Nat. Bank v. Larsen*, 60 Wis. 206; *Morgan v. Edwards*, 53 Wis. 599; *Sylvester Bleckley Co. v. Alewine*, 48 S. C. 308. The question does not appear to have been passed upon by the New York courts.

Where amount of attorney's fee not fixed.—Under this section it is not necessary that the amount of the attorney's fee should be named; but a stipulation for a reasonable attorney's fee is within

the meaning of subdivision five. *Potts v. Crudup*, 150 Pac. Rep. (Okl.) 170; *McCormick v. Swem*, 36 Utah, 6.

Same subject—Effect of the statute.—In the previous editions of this work, the view was expressed that as the statute does not declare that a stipulation for an attorney's fee shall be valid, but merely that it shall not render the paper non-negotiable, no change has been made in the law in those states where such stipulations were held to be void as against public policy; and this view has been since adopted in Ohio and West Virginia. *Miller v. Kyle*, 85 Ohio St. 186; *Raleigh County Bank v. Poteet*, 74 W. Va. 511. Where such a stipulation is valid under the law of the state where the instrument is made and is payable, it will be enforced in an action brought in New York. *First Nat. Bank v. Fleitmann*, 168 App. Div. (N. Y.) 75. For cases in which subdivision five has been applied, see *Oglesby v. Bank of New York*, 114 Va. 663; *First National Bank v. Miller*, 139 Wis. 126; *Carsey v. Swan*, 150 Ky. 473; *Davis v. McCall*, 176 Mo. App. 198; *Bank of Neelyville v. Lee*, 182 Mo. App. 185; *First Nat. Bank v. Stam*, 186 Mo. App. 439; *Pityer v. McCune*, 152 Ill. App. 145; *Bright v. Offield*, 81 Wash. 442; *Mechanics' Amer. Nat. Bank v. Coleman*, 204 Fed. Rep. 24.

§ 3. When promise is unconditional.—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

Indication of Particular Fund.—The mere mention of a fund in a draft does not necessarily deprive it of the character of commercial paper, but it must further appear, in order to have such effect, that it contains either an express or implied direction to pay it therefrom, and not otherwise. *Schmittler v. Simon*, 101

N. Y. 554, 560. In the case cited, a draft drawn upon an executor contained the words, "and charge the amount against me and of my mother's estate." It was held that the reference to the estate was not a direction to pay out of it, but that the estate was referred to simply as a means of reimbursement. So, in *Macleod v. Luce*, 2 Stra. 762; 2 Ld. Raym. 1481, where the instrument contained the words, "as my quarterly half-pay to be due from 24th of June to 27th of September next, by advance," the court said, "The mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person;" and the court accordingly held the instrument to be a bill of exchange. Likewise, in *Redman v. Adams*, 51 Me. 433, where the drawer added, "and charge the same against whatever amount may be due me for my share of fish," it was held that these words were a mere indication of the means of reimbursement, and did not destroy the negotiable character of the draft. And a similar ruling was made in *Whitney v. Eliot National Bank* 137 Mass. 351, where the directions were, "charge the same to account of 250 bbls. meal ex-schooner 'Aurora Borealis' ". See also *Nichols v. Ruggles*, 76 Me. 27. The test is whether the drawee is confined to the particular fund, or whether, though a specified fund is mentioned, he could have the power to charge the bill up to the general account of the drawer, if the designated fund should turn out to be insufficient. *Munger v. Shannon*, 61 N. Y. 251, 255. A draft in the following form: "Pay to the order of the First National Bank of Hutchinson, Kansas, \$1,500 on account of contract between you and the Snyder Plaining Mill Company" was held negotiable, the words "on account of," etc., being deemed an indication of the fund to which the drawee was to look for reimbursement, and not a direction to charge a particular fund. *First Nat. Bank of Hutchinson v. Lightner*, 74 Kan. 736.

Statement of transaction.—An example of a statement of this sort is a note expressed to be in payment of certain tracts of land. *First Nat. Bank of Michael*, 96 N. C. 53. But the most frequent instances are notes given in payment of the purchase price of goods and chattels. Thus, in *Chicago Railway Equipment Co. v. Merchants' Nat. Bank*, 136 U. S. 268, it was held that the negotiable character of a promissory note was not affected by a provision that it was given with others in payment for certain cars, the title to

which should remain in the payee until all the notes of the series should be paid. The court said "The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. The agreement, by which the vendor retains the title and by which the notes are secured on the cars, is collateral to the notes, and does not affect their negotiability. It does not qualify the promise to pay at the time fixed, any more than would be done by an agreement of the same kind, embodied in a separate instrument in the form of a mortgage." So, in *Mott v. Havana Nat. Bank*, 22 Hun, 354, a like ruling was made with respect to a provision in a note that it was to be "in part payment for a portable engine, which engine shall be and remain the property of the owner of this note until the amount hereby secured is paid." So, where there was a similar recital as to the title of a piano, for the price of which the note was given. *Third Nat. Bank v. Bowman*, 50 App. Div. (N. Y.) 66. And so, where there was a recital in the note that it was "given in consideration of a certain patent right." *Hereth v. Meyer*, 33 Ind. 511. Again, it has been held that the words "as per terms of contract" written after the words "value received" on the fact of a promissory note by the maker before its delivery, do not destroy the negotiability of the note or make its payment to a holder in due course conditional upon the performance of the contract intended to be referred to by the maker. *National Bank of Newbury v. Wentworth*, 218 Mass. 30. So, in a late case in New York, it was held that a note in the following form was negotiable: "I shall pay to the order of the American Hoist & Derrick Co., on the 30th day of August, 1911, in the city of New York, the sum of two thousand three hundred and forty (\$2,340) dollars currency, for amount if the second installment agreed on of a crane of their manufacture purchased on this date, according to the specifications of their representative Mr. H. S. Johannsen." *Merchants' Bank v. Santa Maria Sugar Co.*, 162 App. Div. 248. So, where a check contained the words "This check may not be paid unless object for which drawn is stated," and the further words "For Wilkes," it was held that these words did not destroy its negotiable character. *Brown v. Cow Creek Sheep Co.*, 21 Wyo. 1. See also *Equitable Trust Co. v. Taylor*, 146 App. Div. 424; *Bright v. Offield*, 81 Wash. 442; *Hanna v. McGrory*, 141 Pac. Rep. (N. Mex.) 996. But where the recitals in the note

make it dependent upon the terms of a contract referred to therein it is non-negotiable. *Pope v. Lumber Co.*, 162 N. C. 206. See also *Kimpton v. Studebaker*, 14 Idaho, 552.

Payment out of a particular fund.—An order on a savings bank, "Pay C, or order, three hundred dollars, or what may be due on my deposit book No. E, page 632," is payable out of a particular fund, and therefore not negotiable under the statute. *National Savings Bank v. Cable*, 73 Conn. 568. See also, *Lowery v. Steward*, 25 N. Y. 239; *Munger v. Shannon*, 61 N. Y. 251; *Parker v. City of Syracuse*, 31 N. Y. 376; *Morton v. Naylor*, 1 Hill, 583; *Gawken v. De Loraine*, 3 Wils. 207. In the New York case first cited the order was: "Please pay to the order of Archibald H. Lowery the sum of \$500 on account of twenty-four bales of cotton shipped to you as per bill of lading, by steamer Colorado, inclosed to you in letter." It was held that this was not a bill of exchange, requiring acceptance to bind the drawers, but a specific draft or order upon a particular fund. The language of the statute payable "out of a particular fund" is the equivalent of the expression found in many of the cases "drawn on the general credit of the drawer." *Hibbs v. Brown*, 190 N. Y. 167, 175. A clause in the trust securing payment of an issue of bonds provided that, "No present or future shareholder, officer, manager or trustee of the Express Company shall be personally liable as partner or otherwise in respect to this bond or the coupons appertaining thereto, but the same shall be payable solely out of the assets assigned and transferred to the said Express Company or out of other assets of the Express Company:"—*Held*, that while a joint stock association differs from a corporation and is like a partnership in respect to the individual liability of its members, the association issuing the bonds must be regarded as a joint, *quasi* corporate entity; that the bonds having been issued in its name, upon its general credit and binding all its assets, complied with the requirements for a negotiable instrument, even though the practically unimportant individual liability of members was excluded; that such exclusion did not constitute the general assets, out of which the bonds were payable, a particular fund within the meaning of this section. *Id.*

§ 4. Determinable future time—What constitutes.—An instrument is payable at a determinable future

time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

Variant reading.—In Wisconsin the following is interpolated before the last sentence: “4. At a fixed period after date or sight though payable before then on a contingency.”

Mode of Indicating Maturity.—The time of maturity may be indicated in any way that shows the intent. Thus a draft was drawn as follows: “Mr. Wm. Tebo. Will please pay to R. J. Torpey or order two hundred and fifty dollars and charge to my account. Due Oct. 1. John Ryan:”—*Held*, that the words “due Oct. 1,” were to be construed as payable October 1, and hence that the instrument was negotiable. *Torpey v. Tebo*. 184 Mass. 307.

Instrument payable on or before a specified date.—In such a case the legal rights of a holder are clear and certain; the note is due at a time fixed, and it is not due before. The option of the maker, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. See *Mattison v. Marks*, 31 Mich. 421; *Smith v. Ellis*, 29 Me. 422; *Buchanan v. Wren* (Tex.), 30 S. W. Rep. 1077; *Riker v. Sprague Mfg. Co.*, 14 R. I. 402; *Kiskadden v. Allen*, 7 Colorado 206; *Jordan v. Tate*, 19 Ohio St. 586; *Albertson v. Laughlin*, 173 Pa. St. 525. Thus, where the note was made payable twelve months after date, or before, if the money was made out of the sale of a machine, it was held to be negotiable. *Ernst v. Steckman*, 74 Pa. St. 13. So, in *Ackley School District v. Hall*, 113 U. S. 135, 140, it was held that municipal bonds, issued under a statute providing that they should be pay-

able at the pleasure of the district at any time before due, were negotiable. The court said: "By their terms, they were payable at a time which must certainly arrive; the holder could not exact payment before the day fixed in the bonds; the debtor incurred no legal liability for nonpayment until that day passed." So, where a promissory note is secured by a mortgage the reservation in the mortgage of an option to the mortgagor to pay a part of the amount due at any time he may elect before maturity, does not destroy the negotiability of the note. *Fisher v. O'Hanlon*, 93 Neb. 529. So, a provision in a note that it shall become due at the option of the holder in case of nonpayment of taxes and assessments on property mortgaged to secure the note, does not render the note non-negotiable, when considered only with reference to the time of payment, and without regard to the amount thereof. *Bright v. Offield*, 81 Wash. 442. *Des Moines Sav. Bank v. Arthur*, 163 Iowa 205. But compare *Holiday State Bank v. Hoffman*, 85 Kans. 71; *Hibernia Bank & Trust Co. v. Dresser*, 132 La. 532. For a case applying the Wisconsin statute, see *Thorpe v. Mindeman*, 123 Wis. 149.

Event which is certain to happen.—Thus, a note payable a certain number of days after the death of the maker, or upon demand after the death of the maker, is a good promissory note, because the event is sure to happen. *Carnwright v. Gray*, 127 N. Y. 92; *Hegeman v. Moon*, 131 N. Y. 462; *Gilbert v. Adams*, 146 App. Div. (N. Y.) 864. See, also, *Shaw v. Camp*, 160 Ill. 425; *Martin v. Stone*, 67 N. H. 367; *Price v. Jones*, 105 Ind. 544; *Bristol v. Warner*, 19 Conn. 74. So, a note payable at a specified time after the death of a life tenant. *McClenathan v. Davis*, 149 Ill. App. 654. But an instrument payable when, or in so many days after, "A shall become of age," would not be negotiable, because it is uncertain whether A will live so long. *Goss v. Nelson*, 1 Burr. 226; *Rice v. Rice*, 43 App. Div. (N. Y.) 458. So, a note payable "when A shall marry," *Peason v. Garrett*, 4 Med. 242; or when a certain ship shall arrive. *Coolidge v. Ruggles*, 15 Mass. 387; *Grant v. Wood*, 12 Gray, 220.

Stipulation for extension.—As to whether the negotiable character of the paper is destroyed by a stipulation to the effect that the indorsers consent that the time of payment may be extended, the courts are not agreed. On the one hand, it is held that such a stipulation makes the time of payment uncertain. *Roseville*

State Bank v. Heslet, 84 Kans. 315; Union Stock Yards Nat. Bank v. Bolan, 14 Idaho, 87. On the other hand, it is held that as such a stipulation neither confers upon the maker the right to demand an extension, nor imposes upon the payee or indorsee any duty to grant one, it cannot have such effect. Longmont Nat. Bank v. Lonkonen, 53 Colo. 489; Farmer v. Bank of Greattinger, 130 Iowa, 469; De Groat v. Focht, 37 Okla. 267; First Nat. Bank of Pomeroy v. Buttery, 17 N. D. 326; Stitzel v. Miller, 157 Ill. App. 390.

Stipulation for confession of judgment.—Where a note contains a provision to the effect that the holder may enter judgment thereon at any time whether due or not, it is non-negotiable, since the time of payment may depend upon the whim or caprice of the holder, and is wholly uncertain. First Nat. Bank of Elgin v. Russell, 124 Tenn. 618; Wisconsin Yearly Meeting v. Babler, 115 Wis. 289.

Instrument payable upon a contingency.—A draft addressed to a fire insurance company and drawn by its special agent required a trust company to pay the amount thereof to the order of the payee "upon acceptance." *Held*, that the words "upon acceptance" imposed a condition which rendered the draft non-negotiable. Berenson v. London, etc., Ins. Co., 201 Mass. 172. See also, Hibernia Bank & Trust Co. v. Dresser, 132 La. 532; Tisdale Lumber Co. v. Piquet, 153 App. Div. (N. Y.) 266.

Happening of contingency.—Thus, where an instrument is made payable when a certain person shall become of age, the fact that he actually attains his majority does not make the instrument negotiable. Goss v. Nelson, 1 Burr, 226.

§ 5. Provisions which do not impair negotiability.—An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or

2. Authorizes a confession of judgment if the instrument be not paid at maturity; or

3. Waives the benefit of any law intended for the advantage or protection of the obligor; or

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

Variant readings.—In Illinois the words “if the instrument be not paid at maturity,” in subdivision two, are omitted. In Kentucky subdivision three is omitted. In Illinois and Wisconsin the words “or authorize the waiver of exemptions from execution,” are added at the end of the section.

Mortgage notes.—Notes secured by mortgage are often non-negotiable because they incorporate by reference provisions of the mortgage requiring something to be done in addition to the payment of money. Thus, a provision in the note that if the maker shall do any act whereby the value of the mortgaged property shall be impaired, the whole amount shall become due and payable and the mortgagee may proceed to collect the debt and foreclose the mortgage, destroys the negotiability of the note, since it is in effect an undertaking to prevent the doing of certain things in addition to the payment of money, and the provision being similar to a condition authorizing the holder to declare the note due at any time he may deem the debt unsecured. *Bright v. Offield*, 81 Wash. 443. But a provision in the mortgage that the mortgagor shall pay the taxes assessed against the note and mortgage does not affect the negotiable character of the note. *Page v. Ford*, 85 Oregon, 450.

Collateral notes.—Notes of this sort are often non-negotiable because of some provisions therein in regard to the time of payment, or because of provisions requiring something to be done in addition to the payment of money. But a statement that collateral security has been deposited for the performance of the promise contained in the note is a recital only which does not affect its negotiability. *Wise v. Charlton*, 4 A. & E. 486; *Fancourt v. Thorne*, 9 Q. B. 312. And a provision merely authorizing

the sale of the collateral, if the note be dishonored, does not have this effect. *Perry v. Bigelow*, 128 Mass. 129; *Towne v. Rice*, 122 Mass. 67; *Biegler v. Merchants' Loan & Trust Co.*, 62 Ill. App. 560; *Arnold v. Rock River Valley Union R. R. Co.*, 5 Duer, 207. So, a stipulation in a note payable on demand, giving the bank power to sell the collateral before the maturity of the note, in the event of the securities depreciating in value, does not qualify the effect of the promise to pay "on demand." *Brinden v. Muskegon Savings Bank*, 140 N. W. Rep. (Mich.) 549. A statement, however, that the note is "given as collateral security with agreement" destroys its negotiable character. *Costello v. Crowell*, 127 Mass. 293.

Provision for deposit of additional collateral.—As to the effect of the usual provision, that in case of a depreciation in the value of the securities, the maker shall deposit additional securities, and that in default of such deposit, the principal sum shall become due and payable, the courts are not agreed. In Kansas and Louisiana it has been held that such a stipulation destroys the negotiable character of the instrument. *Holiday State Bank v. Hoffman*, 85 Kans. 71; *Hibernia Bank & Trust Co. v. Dresser*, 132 La. 532. But the Court of Appeals of Kentucky in a late case held the contrary. *Finley v. Smith*, 165 Ky. 445. In this case the court said: "It is quite usual to pledge collateral as security for the payment of a negotiable note, and we do not think that any narrow construction of the law should be adopted that would have the effect of impairing the value of this kind of security or that would deny to the holder the right to insist that if the value of the collateral deposited should become impaired the maker must strengthen it or else precipitate the maturity of the paper. This condition in the note is merely supplementary to the fixed and controlling promises, and is really nothing more than additional security for the payment of the instrument. It is not, strictly speaking, 'an order or promise to do an act in addition to the payment of money,' but is rather an order or promise to do an act that will better secure the promise to pay the money stipulated at the time fixed in the note. If this condition or promise would disturb the negotiability of commercial paper, the effect would necessarily be to lessen the value of collateral as security, because holders of paper would not be disposed to accept collateral, much of which has a fluctuating value, if they were denied the right to insist that its

value should be maintained in an amount sufficient to serve the purpose for which it was accepted." In *Kennedy v. Broderick*, 216 Fed. Rep. 137; 132 C. C. A. 381, the defendant executed a note containing over his signature an absolute promise to pay a specific sum 90 days after date at a specific bank waiving demand, protest and notice of nonpayment, and declaring that certain securities delivered to the payee had been pledged as collateral security. At the left of the signature was a provision that the collateral was of the market value of \$5,500; that if the collateral depreciated, the payee might demand additional security or mature the note at once, and that any assignment of the note should carry all the rights to the collateral and that the payee or assignee might sell the collateral at public or private sale: *Held*, that such provision seemed to be a separate contract of pledge, and though written on the note, did not detract from its negotiability.

Collateral note—Rights of indorsee.—A collateral note contained a provision as follows: "Having deposited herewith as collateral security for payment of this or any other liability or liabilities of ——— to the holder hereof now due or to become due." *Held*, that the security might be applied to the payment of an indebtedness due from the maker to an indorsee. *Oleon v. Rosenbloom*, 247 Pa. St. 250. The court said: "The term 'holder' as applied to negotiable paper, has always had the well-recognized legal meaning of the payee or indorsee of it, entitled to receive the sum for which it calls. With us the term is now statutory and it means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof. The covenant which made available the property pledged, as security for liabilities of the maker to any person who might become a holder for value before maturity of the notes, may have tended to facilitate the negotiation of the paper and the plaintiffs had the advantage of that fact." *Id.*

Judgment notes.—Subdivision two was inserted in the act to meet the requirements in some of the states where judgment notes are in use. Such notes are not known in New York. In Pennsylvania it was held that the warrant of attorney rendered the note non-negotiable. *Overton v. Tyler*, 3 Pa. St. 346; *Sweeney v. Thickstum*, 77 Pa. St. 131. A note which authorizes a confession of judgment at any time after its date, whether due or not, is not negotiable under the statute; for as the time of payment

will thus depend upon the whim or caprice of the holder, it is absolutely uncertain. *Wisconsin Yearly Meeting of Freewill Baptists v. Babler*, 115 Wis. 289; *First Nat. Bank of Elgin v. Russell*, 124 Tenn. 618.

Waiver of Exemptions.—In some of the states it is a common practice to insert in promissory notes a waiver of the benefits of homestead and exemption laws, and this provision of the act is designed to meet such cases. See *Zimmerman v. Anderson*, 67 Pa. St. 421; *Zimmerman v. Rote*, 75 Pa. St. 188.

Holder's right of election.—An illustration of this case is the right of the holder to elect to take stock of a corporation in lieu of payment in money. *Hodges v. Shuler*, 22 N. Y. 114. As the obligation of the maker is to pay in money, and as the payment in stock is not optional with him, the note is not within the rule that a negotiable instrument must not be payable in the alternative.—*Id.*

Saving clause.—The object of the last sentence of this section is to prevent any inference of an intent to validate any agreement or stipulation mentioned in the section, where, by any statute or settled policy of the state, the same would be illegal.

§ 6. Matters which do not affect validity, etc., of instrument.—The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

Variant readings.—In Illinois subdivision five reads as follows: "Is payable in currency or current funds, or designates," etc. The Illinois statute also omits the last sentence of the section.

Absence of date.—*Church v. Stevens*, 107 N. Y. Supp. 310. See section 17, which provides that "where the instrument is not dated, it will be considered to be dated as of the time it was issued." As between the immediate parties parol evidence is admissible to show the true date of a misdated note. *Bigge v. Piper*, 86 Tenn. 589.

Where value not stated.—This was the general rule at common law. *Daniel on Negotiable Instruments*, § 108. But formerly in Connecticut a promissory note, not purporting on its face to be for value received did not import a consideration. *Edgerton v. Edgerton*, 8 Conn. 6; *Bristol v. Warner*, 19 Conn. 7.

Presence of seal.—Prior to the statute the Court of Appeals of New York held that the commercial paper of a corporation did not lose the quality of negotiability by having attached thereto the corporate seal. *Chase Nat. Bank v. Faurot*, 149 N. Y. 532; *Weeks v. Esler*, 143 N. Y. 374. See also *Mackay v. St. Mary's Church*, 15 R. I. 121. The same rule had been applied to municipal bonds under seal. *Bank of Rome v. Village of Rome*, 19 N. Y. 20; *Mercer County v. Hackett*, 1 Wall. 83. And to the bonds of private corporations. *Brainard v. N. Y. & H. R. R. Co.*, 25 N. Y. 496. So it was held that the negotiability of a United States treasury note was not restrained or affected by the fact that it was under the treasury seal. *Dinsmore v. Duncan*, 57 N. Y. 573. In *Mercer County v. Hackett*, *supra*, it was said by Justice Grier, speaking of bonds issued under seal: "But there is nothing immoral or contrary to good policy in making them negotiable if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or issuing any species of security not known in the last century." See also *Mason v. Frick*, 105 Pa. St. 162 and cases cited; *Morris Canal, etc., Co. v. Fisher*, 9 N. J. Eq. 699; *National Exchange Bank v. Sartford P. & F. R. Co.*, 8 R. I. 375; *Jackson v. Myers*, 43 Md. 452; *Muth v. Dolfield*, 43 Md. 466. *Contra*, *Osborne v. Hubbard*, 20 Oregon 318. The rule adopted in the act existed by statute in the following states: Colorado, Florida, Georgia, Illinois,

Kansas, Massachusetts, Nebraska, North Carolina, Ohio, and Tennessee. For cases arising under the statute see *Clarke v. Pierce*, 215 Mass. 552; *St. Paul's Episcopal Church v. Fields*, 81 Conn. 670; *Bank of Houston v. Day*, 145 Mo. App. 410; *Arnd v. Heckert*, 108 Md. 300.

Particular kind of money.—Thus, a note payable in gold coin is negotiable. *Chrysler v. Griswold*, 43 N. Y. 209. So is a note payable “in bank notes current in the city of New York.” *Keith v. Jones*, 9 Johns. 120. A note payable “in New York state bills or specie.” *Judah v. Harris*, 19 Johns. 144. And a note payable “in current Florida funds.” *Williams v. Moseley*, 2 Fla. 304. But see *Wright v. Hart's Admr.*, 44 Pa. St. 454, where it was held that a note payable “in current funds at Pittsburgh” was not negotiable. See also *Ford v. Mitchell*, 15 Wis. 304; *Platt v. The Sauk County Bank*, 17 Wis. 222; *Lindsey v. McClelland*, 18 Wis. 481; *Klauber v. Biggerstoff*, 47 Wis. 551.

Saving clause.—In a number of the states it is required that notes given in payment of patent rights shall have written on the face thereof “given for a patent right.” So, there are statutes requiring that what are known as “Bohemian oats” notes shall state the nature of the consideration for which they were given. And so, there are statutes which require this in the case of notes given in payment for lightning rods or stallions, or notes given to “peddlers.” The last sentence of the section is intended to prevent any repeal of such statutes. The New York statutes on the subject have been incorporated into the act. See pages 256-258.

§ 7. When payable on demand.—An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

Instruments payable at sight.—By the law merchant there are some distinctions between instruments payable on demand and

those payable at sight; as, for example, in the matter of days of grace. See *Daniel on Negotiable Instruments*, §§ 617-619, and authorities there cited. This was also the effect of former statutes in some of the states. *Walsh v. Dart*, 12 Wis. 635. The new statute abolishes all these distinctions.

Where no time expressed.—As to instruments in which no time of payment is expressed the Act makes no change in the law. See *Messmore v. Morrison*, 172 Pa. St. 300; *Hall v. Toby*, 110 Pa. St. 318; *James v. Brown*, 11 Ohio St. 601; *Holmes v. West*, 17 Cal. 623; *Porter v. Porter*, 51 Me. 376; *Keyes v. Feustomaher*, 24 Cal. 329; *Bank v. Price*, 52 Iowa 530; *Libby v. Mekelborg*, 28 Minn. 38; *Roberts v. Snow*, 28 Neb. 425; *Bacon v. Page*, 1 Conn. 405; *Raymond v. Sellick*, 10 Conn. 485; *Dodd v. Denny*, 6 Oregon 156. And the legal intendment that the instrument is payable on demand cannot be changed by parol proof. *Roberts v. Snow*, 28 Neb. 425; *Thompson v. Ketcham*, 8 Johns. 146; *Sheldon v. Heaton*, 88 Hun, 535; *Gaylord v. Van Loan*, 15 Wen. 308; *McLeod v. Hunter*, 29 Misc. N. Y. 558 (a case arising under the statute); *Koehning v. Muemminghoff*, 61 Mo. 403; *Self v. King*, 28 Tex. 552. The words "on demand" may be added without avoiding the instrument. *Byles on Bills*, 210.

Overdue paper.—This rule was well established by numerous decisions. See *Berry v. Robinson*, 9 Johns. 121; *Leavitt v. Putnam*, 1 Sandf. 199; *Bassonhorst v. Wilby*, 45 Ohio St. 336; *Light v. Kingsbury*, 50 Mo. 331; *Smith v. Caro*, 9 Oregon 280; *Bemis v. McKenzie*, 13 Fla. 553. It is commonly said that the indorsement of a bill or note which is overdue is equivalent to drawing a new instrument payable at sight. *Bishop v. Dexter*, 2 Conn. 419; *Mudd v. Harper*, 1 Md. 110. In such cases presentment for payment must be made and notice of dishonor given, as in other instances of instruments payable on demand. *Berry v. Robinson*, 9 Johns. 121; *Van Hoosen v. Van Alstyne*, 9 Wend. 79; *Poole v. Tolleson*, 1 McCord, 200; *Patterson v. Todd*, 18 Pa. St. 420; *Rosson v. Carroll*, 90 Tenn. 90; *Brown v. Hull*, 33 Gratt. 23. Where a note, negotiated before due, is further negotiated after it has been dishonored, the holder takes the legal title, and can maintain a suit upon it in his own name, in the same manner as if he had received it before it was due. *French v. Jarvis*, 29 Conn. 353.

§ 8. When payable to order.—The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

Variant readings.—In Illinois after subdivision six a provision is inserted as follows: 7. "An instrument payable to the estate of a deceased person shall be deemed payable to the order of the administrator or executor of his estate."

Paper payable to particular person without more.—By the rules of the law merchant an instrument payable to a specified person without the addition of the word "order," or other word of similar import, was not negotiable. Byles on Bills, p. 83; *Smith v. Kendall* 6 T. R. 123; *Maule v. Crawford*, 14 Hun, 193; *Carnwright v. Gray*, 127 N. Y. 92. The English Bills of Exchange Act provides that "a bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable." But this change in the law was not deemed advantageous, and was not adopted.

Note payable to the order of the maker.—Such a note is not complete until indorsed by the maker. See section 184.

Indorsement in the alternative.—Under the statute a note payable to either of two payees may be transferred by the indorsement of either of them. *Union Bank of Bridgewater v. Spies*, 130 N. W. Rep. (Iowa) 928; *Vorin v. Schoonover*, 91 Kans. 530. So,

a note indorsed to two indorseees in the alternative may be transferred by the indorsement of either. Page v. Ford, 65 Oregon 450. But it seems that in an action upon a note payable to two persons in the alternative the interest is deemed joint, and both must join. Passut v. Heuvner, 81 Misc. (N. Y.) 249.

Where payable to holder of office.—For example, a note payable to three persons as trustees of an incorporated association, or their successors in office, is negotiable. Davis v. Gore, 6 N. Y. 124.

Designation of payee.—The payee need not be designated by name. If his identity can be ascertained with certainty, it is sufficient. United States v. White, 2 Hill, 59; Blackman v. Lehman, 63 Ala. 547.

§ 9. When payable to bearer.—The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank.

Variant readings.—In Illinois subdivision three reads as follows: "When it is payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in it." This language is quite inaccurate. Intended by whom? By the drawer or maker, or by someone else? Besides, an indorser as well as the maker or drawer, may make the instrument payable to a fictitious person, as, for example, where a check drawn to the order of A is indorsed by him to B, whom he knows to be fictitious. To such a case the Illinois statute would not apply, since, by its terms, it is limited to cases where the act is that of the maker or drawer.

In Illinois subdivision five reads as follows: "When although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee." This was the rule at common law. But it is not suited to modern conditions, and in England was changed by statute. In the every-day business of the banks it is very inconvenient. For example, if a man in New York should send a merchant in Chicago, his check drawn to the order of that merchant, and the latter should indorse the check in blank, and deposit it in his bank, how would the Chicago bank safely remit that check to New York? Under the statute as it exists in all the other states, the matter is simple enough; for the Chicago bank has only to indorse the paper specially to its correspondent, and then the "last" indorsement not being in blank, the paper is no longer payable to bearer. But under the Illinois statute the check must continue to be payable to bearer merely because the payee has indorsed in blank. See note to section 40.

Fictitious payee—Knowledge of maker.—Before the adoption of the statute it was well settled that an instrument drawn to the order of a fictitious person was not to be deemed payable to bearer, unless the fictitious character of the payee was known to the person making the instrument so payable. As said by the Court of Appeals of New York, in *Shipman v. Bank of the State of New York*, 126 N. Y. 318, "The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person." Hence, if the maker or drawer supposes the payee to be an actually existing person (as, for instance, where he is induced by fraud to draw the instrument to the order of a fictitious person whom he supposes to exist), the instrument will not be payable to bearer, and no person can acquire the title thereto by delivery. And where the instrument is drawn payable at a bank, the bank cannot charge the same to the account of its customer, since the instrument is not in such case payable to bearer, and the indorsement is a forgery. *Shipman v. Bank of the State of New York*, *supra*; *Armstrong v. Bank*, 46 Ohio St. 412; *Bank of England v. Vagliano* [1891], App. Cas. 107. But see *Clutton v. Attenborough* [1895], 2 Q. B. 707.

Same Subject—Effect of the statute.—Under the statute, as formerly, it is only when the person making the instrument knew

that he was making it payable to a fictitious or nonexistent person and it can be treated as payable to bearer. *Boles v. Harding*, 201 Mass. 103; *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26. Hence, where a draft procured by the fraudulent act of an employee of a firm was made payable to an existing partnership and delivered to such employee, who then forged the indorsement of the partnership and deposited the draft to his own account in another bank, it was held that the draft could not be treated as payable to a fictitious person. *Seaboard Nat. Bank v. Bank of America*, *supra*. And an instrument is not to be treated as payable to a fictitious payee merely because the drawer has been induced to draw the same by a fraudulent representation that he is indebted to the person named as payee. *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397. Or by a fraudulent representation as to the identity of the payee. *Boles v. Harding*, 201 Mass. 103; *Hartford v. Greenwich Bank*, 215 N. Y. 726; *S. C. 157 App. Div. 448*. But though the instrument is drawn payable to the order of an existing person, yet if the person drawing it did not intend that it should be delivered to the ostensible payee or be indorsed by him, it is to be deemed drawn to the order of a fictitious person, and therefore payable to bearer. *Snyder v. Corn Exchange Nat. Bank*, 221 Pa. 599; *Trust Co. of America v. Hamilton Bank*, 127 App. Div. (N. Y.) 515. Where an indorsement signed by the payee is to a fictitious person or "bearer" the fictitious name may be stricken out, and suit may be maintained on the note without the indorsement of such name; and this is true whether the payee knew, or did not know, his indorsee was a fictitious person. *Keenan v. Blue*, 240 Ill. 177.

Instrument payable to estate of deceased person.—It has been held that a note made payable to the order of the estate of a deceased person is a promissory note with a fictitious payee, and that where it has been negotiated by the maker it is deemed as against him to be a note payable to bearer. *Lewisohn v. The Kent & Stanley Co.*, 87 Hun, 257. But the correctness of this view seems very questionable. The ground of the rule is that, as the fictitious payee cannot indorse the instrument, the drawer or maker must have intended that it should be payable to bearer. But no such intention can properly be ascribed where the instrument is drawn payable to the order of an estate; for the obvious intention is

that it shall be paid upon the order of the decedent's legal representatives, and that they shall indorse the paper. Checks are frequently drawn in this way, and it appears to be the understanding of the business community that they require the indorsement of the executor or administrator.

Where name not that of a person.—Thus, checks are often drawn payable to "cash" or to "sundries." See *Willets v. Phoenix Bank*, 2 Duer, 121; *Mechanics' Bank v. Stratton*, 2 Keyes, 365. And subdivision 4 was intended to cover all such cases.

Where last indorsement is blank.—Where a note payable to the maker is indorsed in blank and contains no other indorsement it is payable to bearer under this section. *Davis v. First Nat. Bank of Blaksely*, 62 So. Rep. (Ala.) 261; *Peoples' Nat. Bank v. Taylor*, 149 Pac. Rep. (Ariz.) 763. But an indorsement in blank on the back of a non-negotiable note does not render it negotiable under the statute. *Johnson v. Lassiter*, 155 N. C. 47; *Wettlaufer v. Baxter*, 137 Ky. 362. If the maker of a promissory note wrongfully obtains possession of it after it has been indorsed in blank by the payee, he is the bearer within the meaning of the statute. *Massachusetts National Bank v. Snow*, 187 Mass. 159.

§ 10. What terms sufficient.—The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

Variant readings.—In Alabama, Idaho, Iowa, North Carolina and Wyoming, the word "negotiable" is interpolated between the words "The" and "Instrument" at the beginning of the section. But as by section two the word "Instrument" is declared to mean "negotiable instrument" the interpolation is surplusage. In Wisconsin the following is added at the end of the section: "Memoranda upon the face or back of the instrument, whether signed or not, material to the contract, if made at the time of the delivery, are part of the instrument, and parol evidence is admissible to show the circumstances under which they were made." But this is hardly germane to the general scheme of the act, which was confined intentionally to the substantive law peculiar to negotiable paper.

Foreign language—Mode of writing.—It may be written in a foreign language as well as in English. *Debebian v. Gala*, 64 Md. 262, 265. The writing may be in pencil as well as in ink. *Brown v. Buetchers' Bank*, 6 Hill, 443. As to the construction of ambiguous instruments, see section 17.

§ 11. Presumption as to date.—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

Place of contract—Presumption.—A negotiable instrument is presumed to have been made where it is dated, and hence an action upon a note dated in the city of New York, must be deemed to be brought upon a contract made in the state of New York. *Manufacturers' Commercial Co. v. Blitz*, 131 App. Div. (N. Y.) 17. But evidence is admissible, as between the immediate parties, to show a mistake in the date. *Cowing v. Altman*, 71 N. Y. 441. If the date is an impossible one, the law will adopt the nearest day. Thus, if the date is written September 31st, the true date will be deemed to be September 30th. *Wagner v. Kenner*, 2 Rob. (La.) 120.

§ 12. Ante-dated and post-dated.—The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

Post-dated instrument.—The fact that a check is post-dated does not make it non-negotiable. *Triphonoff v. Sweeney*, 65 Oregon, 209. And it may be negotiated before the day of its date. *Brewster v. McCardle*, 8 Wend. 478; *Pasmore v. North*, 13 East 517. Nor does the negotiation of such a check before the day of its date put the indorsee upon notice. *Triphonoff v. Sweeney*, *supra*; *Albert v. Hoffman*, 64 Misc. (N. Y.) 87. The section contemplates instruments which are ante-dated or post-dated in ac-

cordance with a mutual agreement between the parties. *Bank of Houston v. Day*, 145 Mo. App. 410 Where a bank pays a post-dated check before the date thereof, and then dishonors other checks because the payment of the post-dated check has left insufficient funds for that purpose, it is liable to the depositor for a wrongful refusal to pay his checks. *Smith v. Maddox-Rucker Banking Co.*, 135 Ga. 151. If for the purpose of evading the law, a false date is inserted in the instrument, it will be void as to all persons having notice. *Serle v. Norton*, 9 M. & W. 309.

§ 13. When date may be inserted.—Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

Question of wrong date.—Where an undated note is issued, and an improper date is inserted therein by the payee, and it is thereafter negotiated to an innocent third party such party may enforce the same, notwithstanding the improper date. *Bank of Houston v. Day*, 145 Mo. App. 410; *Redlich v. Doll*, 54 N. Y. 238; *Page v. Monell*, 3 Abb. Ct. App. Dec. 433; *Mitchell v. Culver*, 7 Cow. 336. But the provision that the insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, implies that the insertion of a wrong date in an undated instrument by one having knowledge of the true date of issue would avoid the instrument as to him. *Bank of Houston v. Day*, *supra*.

§ 14. Filling blanks — rights of holder.—Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And

a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

Variant readings.—In Illinois the words “issued or” are inserted between the words “is” and “negotiated” near the beginning of the last sentence. In Wisconsin the words “prior to negotiation” are inserted between the words “it” and “by” near the end of the first sentence; and the words “an authority” are substituted for “a prima facie authority” near the end of the second sentence. In South Dakota this section is struck out, and the following substituted therefor: “One who makes himself a party to an instrument intended to be negotiable, but which is left wholly or partly in blank, for the purpose of filling afterwards, is liable upon the instrument to an indorsee thereof in due course, in whatever manner and at whatever time it may be filled, so long as it remains negotiable in form.”

Authority to complete the instrument.—The leading authority upon this point is *Russell v. Langstaffe*, 2 Doug. 514. In that case a person had indorsed his name on five copperplate checks, blank as to amounts, dates and times of payment, and the holder, Galley, filled them up as his own notes with different dates, amounts and times of payment. The indorser was held liable to the plaintiff, who had discounted them. Lord Mansfield said: “The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said ‘Trust Galley for any amount, and I will be his security.’ It does not lie in his mouth to say the indorsement

was not regular." See also *Ovrick v. Colston*, 7 Gratt. 189; *Frank v. Lillienfeld*, 33 Gratt. 377; *Boyd v. McCann*, 10 Md. 118; *Elliott v. Chestnut*, 30 Md. 562; *Androscoggin Bank v. Kimball*, 10 Cush. 373. If the place for the name of the payee is left blank the holder may fill it up with his own name as payee. *Boyd v. McCann*, 10 Md. 118.

What may be inserted.—But it will be noticed that the authority is only to *complete* the instrument, for while there is an authority to fill up blanks in order to make the instrument complete as such, there is no authority to insert a special agreement not essential to the completeness of the instrument. *Weyerhauser v. Dunn*, 100 N. Y. 150. The authority given by this section to fill up the blanks is not confined, however, to such matters as are barely sufficient to make the paper a complete negotiable instrument, but extends to such other matters as are proper to, and are usually found in, such instruments. Thus, where a blank space was left after the word "at" in a printed form of promissory note, the addition of the words "Des Moines, Iowa," was held to have been authorized. *Johnston v. Hoover*, 139 Iowa, 143. So, where the space for the amount of the attorney's fee was left blank, and the parties contemplated that such amount as should be necessary should be filled in, it was held that the holder had authority to fill in the blank with a reasonable amount. *Schnitzer v. Kramer*, 268 Ill. 603.

Necessity for delivery—Intention.—It is to be noticed that the authority to fill up a blank paper for any amount applies only where the paper has been delivered; and the delivery must have been with the intention that the paper should be converted into a negotiable instrument. *Iowa State Bank v. Claypool*, 91 Kans. 251. See next section.

Burden of proof.—Under section 16, the production of the instrument raises a presumption of a valid and intentional delivery, and under section 14 such delivery operates as *prima facie* authority to fill up the blanks; and hence the holder has not the burden of proving that the instrument was filled up in accordance with the authority given, but the party sought to be held liable must show the agreement and the violation of its terms. *Madden v. Gaston*, 137 App. Div. (N. Y.) 294.

Blank space with figures in margin.—Where the amount is stated in figures in the margin, and a blank space is left for the amount in the body of the instrument, it is not complete until the blank is filled up. *Chestnut v. Chestnut*, 104 Va. 539; *Hallen v. Davis*, 59 Iowa 444; *Norwich Bank v. Hyde*, 13 Conn. 281; *Schreyer v. Hawkes*, 22 Ohio St. 308, 315; *Garrard v. Lewis*, L. R. 10 Q. B. Div. 30. But in such case the amount cannot be filled in for a larger sum than that indicated by the figures. *Norwich Bank v. Hyde*, 13 Conn. 284.

True date to be inserted.—Where a blank is left for the date, the date which the holder is authorized to insert is the true date, and where the holder with knowledge of the true date, inserts an untrue date, he is not a subsequent holder in due course. *Bank of Houston v. Day*, 145 Mo. App. 410.

Where instrument negotiated prior to completion.—Where A delivered his note in an incomplete condition to B, and the latter transferred it in the same condition to C, and it was not completed in accordance with authority: *Held*, that C was not a holder in due course and could not recover. *Stone v. Sargent*, 220 Mass. 445; *Tower v. Stanley*, Id. 429. So, where A signed a note in which a blank space was left for the name of the payee, and entrusted it to his co-maker to be used in buying a meat market, but the co-maker delivered the note to a bank, which inserted its own name as payee, it was held that the note was not enforceable against A. *Hartington Nat. Bank v. Breslin*, 88 Neb. 47. See also *Union Trust Company v. McCrum*, 145 App. Div. (N. Y.) 409; *Mannussier v. Wright*, 158 Ill. App. 219. So, where notes incomplete as to date, time of payment and amount were left with a bank, and were filled out from time to time by the cashier, it was held that the bank was not a holder in due course. *Hunter v. Allen*, 127 App. Div. (N. Y.) 572. So, where a woman delivered to her husband a check signed by her and made payable to a certain creditor, but with the amount left blank, instructing her husband to apply it in payment of her debt, and the husband delivered it to the creditor with the blank unfilled, to be used as a payment upon a debt of his own to the same creditor, and allowed the creditor with his consent to fill in the blank with a certain amount as such payment: *Held*, that the check was an incomplete instrument under this section, and that

in an action brought by the creditor against the woman for her indebtedness to him, alleged to be unpaid, she could introduce evidence to show that, by the authority actually given him, her husband had no right to treat the check as he did, or to apply it otherwise than in payment of her debt. *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140. See also *Exchange Bank v. Robinson*, 185 Mo. App. 582; *Kramer v. Schnitzer*, 109 N. E. Rep. (Ill.) 695.

Blank space left in completed instrument.—It is important not to confuse two different classes of instruments, viz.: (1) those in which obvious blanks are left at the time when they are made or indorsed, of such a character as manifestly to indicate that they are incomplete until such blanks shall be filled up, and (2) those which are apparently complete, and which can be regarded as containing blanks only because the written matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures, or both. The provision of the statute obviously applies only to instruments of the first class. As to instruments of the second class, the authorities are not agreed as to the liability of a party issuing or negotiating an instrument so made out. In some cases it has been held that one who sends forth a check, note or bill filled out in such a manner as to invite an alteration in the amount may be held for the sum to which the paper has been raised. *Garrard v. Hadden*, 67 Pa. St. 82; *Yocum v. Smith*, 63 Ill. 321; *Scotland Co. Nat. Bank v. O'Connel*, 23 Mo. App. 165; *Hacket v. First Nat. Bank of Louisville*, 114 Ky. 193; *Isnard v. Torres*, 10 La. Ann. 103; *Young v. Grote*, 4 Bing. 253. But other courts have held that no liability on the part of a party to the paper can be predicated simply upon the fact that such spaces exist therein. *Nat. Exchange Bank v. Lester*, 194 N. Y. 461; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219; *Greenfield Savings Bank v. Stowell*, 123 Mass. 196; *Holmes v. Trumper*, 22 Mich. 427; *Knoxville Nat. Bank v. Clark*, 51 Iowa 264; *Burrows v. Klunk*, 70 Md. 451.

Liability to holder in due course.—If the instrument be used, or the blanks filled up contrary to the agreement or intention of the original parties, the maker is held to any *bona fide* holder for value, upon the principle that where one or two innocent parties must suffer by the fraud or wrong of a third person the one who put it in the power of such third person to commit the fraud or

wrong must bear the loss. The liability of the maker in such case has also, sometimes, been placed upon the principle of estoppel; he, having put his paper in circulation, and thus invited the public to receive it of any one having apparent title, is estopped to urge the actual defect of title against a *bona fide* holder. *Redlich v. Doll*, 54 N. Y. 234, 238. Where one makes and delivers a promissory note, perfect in form, except that a blank is left after the word "at" for the place of payment, there is an implied authority for any *bona fide* holder to fill the blank, and the insertion of a place of payment, and negotiation of the note, contrary to the agreement of the original parties, does not avoid it in the hands of a *bona fide* holder for value. (*Id.*) So, one who intrusts another with his blank acceptance is liable to a holder for value, though filled up for a sum exceeding that limited by the acceptor. *Van Duzer v. Howe*, 21 N. Y. 531.

Alterations.—The provision of the statute that in the hands of a holder in due course the instrument is valid and effectual for all purposes applies only where blanks are filled up, and not in cases where there have been alterations. Thus, where B, for the accommodation of his brother, placed his indorsement on a printed form of promissory note, which contained the words "at the Second National Bank of Wilkes-Barre, Pa.," and the brother besides filling out the blanks, struck out the name of the Second National Bank and inserted the name of another bank, which discounted the note, it was held that, while the filling out of the blanks was impliedly authorized, the change of name of the bank where the instrument was to be payable was a material alteration and discharged the indorser. *First Nat. Bank of Wilkes-Barre v. Barnum*, 160 Fed. Rep. 245.

Whether payee may be holder in due course.—In *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, the defendants placed their signatures on a blank printed form at the request of P, who was a partner of one of them in a mercantile business, on the representation that he might find it necessary to raise \$150 or \$200 for temporary use in the business. Afterwards P, being indebted on his individual account to the plaintiff, filled out the form for \$2,000 payable to the order of the plaintiff, and delivered the same to the plaintiff without authority from the defendants: *Held*, that the plaintiff could not be deemed a holder in due course, since he was a party to the

original contract, and not a person to whom the paper had been *negotiated*. The court said: "It seems to us under these definitions and the application thereof the plaintiff was a holder of the note, but not a holder in due course. The latter term seems unquestionably to be used to indicate a person to whom after completion and delivery the instrument has been negotiated. In an ordinary case [the payee] is the person with whom the contract is made, and his rights are not in general dependent on any peculiarities in the law of negotiable instruments. The peculiarities of that law distinguishing negotiable instruments from other contracts relate to a holder who has taken by negotiation, and not as an original party." But the contrary was held by the Supreme Court of Massachusetts in the late case of *Liberty Trust Co. v. Tilton*, 217 Mass. 462. In that case T signed a note to the order of the plaintiff with the amount left blank, and the defendant indorsed the note upon the representation and agreement of T that it should be filled out for \$200 and no more. But T, in violation of his agreement, filled in the amount of \$400, and delivered the note complete in form to the plaintiff, the payee, who took it in good faith and for value. It was held that the payee under these circumstances was a holder in due course. Compare *Guerrant v. Guerrant*, 7 Va. Law Reg. 639. See also note to section 52.

§ 15. Incomplete instrument not delivered.—Where an incomplete instrument has not been delivered it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

Variant readings.—In Wisconsin the word "negotiation" is substituted for "delivery" at the end of the section.

Necessity for delivery—Stolen instrument.—A negotiable instrument must be complete and perfect when it is issued, or there must be authority reposed in some one afterward to supply any thing needed to make it perfect. *Sedgwick v. McKim*, 53 N. Y. 307, 313; *Davis Sewing Machine Co. v. Best*, 105 N. Y. 59, 67. And while the possession of such instrument is *prima facie* evidence of delivery, yet if it appear that the instrument was never actually de-

livered, there can be no recovery upon it, even when in the hands of an innocent holder. *Linick v. Nutting*, 140 App. Div. (N. Y.) 265. And mere negligence on the part of the person sought to be held liable will not be sufficient to entitle the holder to recover of him on the instrument. *Baxendale v. Bennett*, L. R. 8 Q. B. Div. 525. Thus, in the case last cited, where a blank acceptance which had been given to one person and returned by him was afterward stolen from the acceptor and another person filled in his own name and negotiated the bill, it was held that there could be no recovery on such acceptance even by a *bona fide* holder for value. *Barnwell, L. J.*, said: "The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime. But it is said that he had done so through negligence. I confess I think he has been negligent—that is to say, I think if he had had this paper from a third person as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion." The same rule was applied where a check signed in blank by the drawer was stolen and, after being filled out, was negotiated to a holder for value. *Linick v. Nutting*, 140 App. Div. (N. Y.) 265.

Agreement that others shall sign.—Where a promissory note is delivered by the maker to the payee, upon a verbal agreement that the instrument shall not take effect until other persons shall have signed, the paper will have no validity as between the original parties, unless so completed. *Hodge v. Smith*, 130 Wis. 326. If only part of such other signatures be obtained, the party first signing may defend on the ground that the instrument was never either completed or delivered, while the other parties may defend on the ground of fraud, even though they themselves signed unconditionally, for the reason that the paper never took effect as to the conditional maker. (*Id.*) See note to section 55.

§ 16. Necessity for delivery — presumption of — when effectual — when presumed.—Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a

holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

Variant readings.—In North Carolina the words “accepting or,” between the words “drawing” and “indorsing” in the second sentence are omitted. In Kansas the third sentence, which provides for a conclusive presumption of delivery in favor of a holder in due course, is omitted. In South Dakota the sentence beginning with the word “But” and ending with the word “presumed” is struck out, and the following substituted therefor: “An indorsee of a negotiable instrument in due course, acquires an absolute title thereto, so that it is valid in his hands, notwithstanding any provision of law making it generally void or voidable, and notwithstanding any defect in the title of the person from whom he acquired it.”

Necessity for delivery.—Like other written contracts, a bill of exchange or promissory note has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intent of the parties. *Burson v. Huntington*, 21 Mich. 416. And the paper takes effect from the time of its delivery, and not from its date, as until the maker parts with the possession and control of the instrument he may cancel it or dispose of it as he pleases. *Burr v. Beekler*, 264 Ill. 230. The provision in the first sentence of this section does not render incomplete a promissory note indorsed in blank by the payee and afterwards stolen from him by the maker and presented by the thief to a bank which discounts it in good faith, because such a note takes effect when de-

livered by the maker to the payee, and is made payable to bearer by the payee's indorsement in blank before the theft. *Massachusetts National Bank v. Snow*, 187 Mass. 160.

Instrument payable to order of drawer.—A paper purporting to be a bill of exchange payable to the order of the drawer, does not come into existence as a bill until it is delivered as well as indorsed by the drawer. *Stouffer v. Curtis*, 198 Mass. 560.

Conditional delivery.—The rule was well established before the adoption of the statute that a negotiable instrument may be delivered upon a condition, the observance of which is essential to its validity as between the parties; and parol evidence of such a condition was not deemed an attempt to vary or contradict the written contract. *Niblock v. Sprague*, 200 N. Y. 390; *Hodge v. Smith*, 130 Wis. 326; *McFarland v. Sikes*, 54 Conn. 250. And by the express language of section 16, this is the rule adopted in the statute. *Sayre v. Leonard*, 57 Colo. 116. Thus, as between the original parties, it can be shown by parol evidence that the note, although delivered, was only to become binding in case the maker should sell certain bonds placed in his hands as agent for sale. *Hill v. Hall*, 191 Mass. 253. Nor does the Negotiable Instruments Law or the Statute of Frauds require that a contract of conditional delivery shall be in writing. *Norman v. McCarthy*, 56 Colo. 290.

Holder in due course.—When the instrument is in the hands of a holder in due course, then, under the express language of section 16, a valid delivery is conclusively presumed. *Borough of Montvale v. Peoples' Bank*, 74 N. J. L. 464; *Schaeffer v. Marsh*, 90 Misc. (N. Y.) 307. Thus, as against a holder in due course the drawer of a check cannot show that it was delivered by his clerk without his authority. *Buzzell v. Tobin*, 201 Mass. 1. In this respect the statute changes the law in some of the states. In some cases it was held that an instrument in the form of a negotiable promissory note, which had never been delivered by the alleged maker, had no legal existence as a note, and the party sought to be charged upon it might always, unless estopped by his own negligence, defend successfully against it, without regard to the time when, or the circumstances under which, it was acquired by the holder. *Roberts v. McGrath*, 38 Wis. 52; *Chipman v. Tucker*, 38 Wis. 43; *Griffiths v. Kellogg*, 39 Wis. 290;

Burson v. Huntington, 21 Mich. 416. This change, like some others made by the Act, was to facilitate the circulation of commercial paper. The provision does not apply, however, in the case of an incomplete instrument completed and negotiated without authority. See section 15.

Pleading delivery—Proof of title.—An allegation that a promissory note was made by the defendants is equivalent to an allegation and imports, not only that it was signed, but also that it was delivered to take effect as a negotiable instrument. *First Nat. Bank v. Stallo*, 160 App. Div. (N. Y.) 702. And an allegation that the note was made payable to the order of the plaintiff shows that the delivery was to him, and sufficiently shows his ownership. *Id.* Nor need the plaintiff allege that he has not parted with possession or title. *Id.* Possession of the instrument is *prima facie* evidence of title. *Newcombe v. Fox*, 1 App. Div. (N. Y.) 389; *Chandler v. Hedrick*, 187 Mo. App. 664.

§ 17. Construction where instrument is ambiguous.

—Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there

is doubt whether it is a bill or note, the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

Variant readings.—The North Carolina subdivision two is omitted. In Wisconsin the following is added at the end of the section: "8. Where several writings are executed at or about the same time, as parts of the same transaction, intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof." No one will quarrel with this statement of a general legal proposition; but why it should have been inserted in the Negotiable Instruments Law is not easy to discover.

Marginal figures—Effect of.—The figures in the margin of a bill or note are regarded as simply a memorandum or abridgement for convenience or reference, and form no part of the instrument. *Smith v. Smith*, 1 R. I. 388; *Norwich Bank v. Hyde*, 13 Conn. 281; *Schreyer v. Hawkes*, 22 Ohio St. 308. Where the marginal figures of a bill were 245 l., but the words "two hundred pounds" were written in the body of the instrument, it was held to be for the latter sum. *Saunderson v. Piper*, 5 Bing. N. C. 425. In *Garrard v. Lewis* (L. R. 10 Q. B. Div. 30, 32), Lord Justice Bowen, speaking of the import and effect of marginal figures at the head of a bill of exchange, said: "They do not seem in general to have been considered among merchants as of the same effect and value as the mention of the sum contained in the body of the bill. The history of these marginal figures may perhaps be shortly summarized as follows: The first model of a bill of exchange preserved to us, and which dates from 1381, does not, I believe, possess them, though it does possess the nature or vocation with which merchants' bills used generally to commence, and which usually preceded the figures.

The marginal figure at the head of a bill was probably added at a very early date, in order that the amount of the bill might strike the eye immediately, and was in fact a note, index or summary of the contents of the bill which followed."

Where rate of interest not specified.—Where a note read "with interest at the rate of — per cent. from — until paid," it was held that the note drew interest at the legal rate from its date. *Hornstein v. Cifuno*, 86 Neb. 103. So, where the note read "with interest at — per cent. per annum." *Franklin Nat. Bank v. Roberts*, 168 N. C. 473. The legal effect of not filling in the blank is the same as if there had been nothing written or printed after the word "interest." *Id.*

Instrument not dated.—See *Kingsley v. Sampson*, 100 Ill. 54. As to the right of the holder to fill in the date, see section 14.

Conflict between written and printed portions.—The rule declared in the statute is that which applies to contracts generally. *Chadsey v. Guion*, 97 N. Y. 333. It applies where there is a conflict between provisions which are typewritten and those written by hand. *Acme Coal Co. v. Northrup Nat. Bank*, 146 Pac. Rep. (Wyo.) 593. In the case last cited there was a conflict as to the rate of interest, the figure "7" being typewritten and the figure "8" written with pen and ink. The court said: "Had the figure '7' been printed in the blank as it was printed on the printing press, and the figure '8' written with pen and ink, the rule of the statute would unquestionably apply. The question here is: Is that portion of this note which is typewritten to be considered as printed or as written? When we consider what we consider to be the reason for the rule as laid down in the statute, and the connection with which the words 'written' and 'printed' were there used, we think the question is not difficult of solution. The printed form or blank is used for convenience and is prepared in advance of the final agreement between the parties; and when a conflicting provision is afterward inserted therein in writing, the natural and reasonable presumption is that the later and written provision expresses the true intent of the parties." But this rule does not permit of the rejection of any of the printed matter which by any reasonable construction may be reconciled with the written part. *Miller v. Hannibal & St. Jo. R. R. Co.*, 90 N. Y. 430; *Magee v. Lovell*, L. R. 9 C. P. 107; *Joyce v. Realm Ins. Co.*, L. R. 7 Q. B. 580.

Uncertainty as to character of paper.—See *Heise v. Bumpass*, 40 Ark. 547. Where the instrument ran "On demand, I promise to pay A. B., or bearer, the sum of fifteen pounds, value received," and was addressed in the margin to one J. Bell, who wrote upon it, "Accepted, J. Bell," it was considered to be in effect the note of J. Bell, as it contained a promise to pay, although, in terms, it was an acceptance. *Block v. Bell*, 1 M. & R. 149. So, where the instrument was in the following form: "London, August 5, 1833. Three months after date I promise to pay Mr. John Bury or order forty-four pounds, eleven shillings, and five pence, value received, John Bury," and was addressed in the lower left-hand corner "J. B. Grutherot, 35 Montague Place, Bedford Place," and Grutherot's name was written across the face as an acceptance, and Bury's name across the back as an indorsement, it was held that Bury might be held either as the drawer of the bill against Grutherot, or as the maker of the note, and therefore was bound without notice of dishonor. *Edis v. Bury*, 6 Barn. & Cres. 433. In another case the instrument ran: "Two months after date I promise to pay A. B. or order ninety-nine pounds, H. Oliver," and was addressed to J. E. Oliver and accepted by him. The court said: "It is not unjust to presume that it was drawn in this form for the purpose of suing upon it either as a promissory note or as a bill of exchange." *Lloyd v. Oliver*, 18 Q. B. 471.

Uncertainty as to capacity.—For example, if a person should write his name across the face of a note, he would, under subsection six be deemed an indorser. There are some decisions which hold that in such case he would be deemed a joint maker. It is, perhaps, not very important which view is adopted, so that the rule upon the subject is fixed and certain. Throughout the act it has been the policy to make all irregular parties indorsers. See section 64. In *Germania Nat. Bank v. Mariner*, 129 Wis. 544, a note read: "'Four months after date the Northwestern Straw Works promise to pay,' etc., and was signed 'The Northwestern Straw Works, E. R. Stillman, Treas.; John W. Mariner.'" Mariner was the secretary of the corporation, duly authorized to sign the note on its behalf:—*Held*, that the signature of Mariner was not so placed on the instrument as to make it doubtful in what capacity he intended to sign, within the meaning of this section. The court said: "This provision, by its very terms, applies only

to a case of doubt arising out of the location of the signature upon the instrument. Names are sometimes placed at the side, on the end, or across the face of the instrument, and thus a doubt arises as to whether the signer intended to be bound as a maker or indorser, or perhaps as a guarantor, and to solve these doubts the section in question was evidently framed. It was to settle a doubt fairly arising from the ambiguous location of the name, and applies to no other. In the present case there is no doubt of this nature. The signature of Mr. Mariner is placed in the usual and proper, in fact the only proper, place for a maker. The doubt arising is not a doubt whether he intended to sign as maker, indorser, or guarantor, for it is clear from the location of the name that he did not intend to sign as indorser or guarantor, but simply a doubt whether he intended to sign in an individual or in a representative capacity as maker. To say that, where it conclusively appears from the instrument that the signer intended to sign as a maker, the statute is intended to make him an indorser, would be little short of ridiculous. The statute was passed to meet a case where it is doubtful from the instrument whether a man intended to become an indorser, not to make an indorser out of a person who, without doubt, intended to sign as a maker, either individually or as representative of another. We have no doubt, therefore, that this section has no application to the present case." Where two officers of a corporation indorsed on the company's demand note the following words: "For value received, we hereby guarantee the prompt payment of this note," and followed the words with their signatures, they were held liable as sureties, and not as guarantors of the instrument. *Iron City National Bank v. Rafferty*, 207 Pa. St. 238.

Two or more signing where note is in the singular.—See *Monson v. Drakeley*, 40 Conn. 559; *Solomon v. Hopkins*, 61 Conn. 47; *Dart v. Sherwood*, 7 Wis. 523.

§ 18. Only persons signing liable—trade or assumed name.—No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

Variant readings.—In Wyoming the word “expressly” in the first sentence is omitted.

Necessity for signature.—Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent. *Manufacturers’, etc., Bank v. Love*, 13 App. Div. (N. Y.) 561; *Briggs v. Partridge*, 64 N. Y. 363. Under this section, a firm upon whom a draft is drawn by its commercial traveller is not liable thereon before acceptance by reason of any custom in previous years to honor such drafts. *Seattle Shoe Co. v. Packard*, 43 Wash. 527.

Trade or assumed name.—A person may become a party to a bill or note by any mark or designation he chooses to adopt, provided it be used as a substitute for his name and he intends to be bound by it. *De Witt v. Walton*, 9 N. Y. 571; *Brown v. Butchers’ & Drovers’ Bank*, 6 Hill, 443. In the case last cited, which was a suit against the defendant as indorser of a bill of exchange, the indorsement was made with a lead pencil in figures, thus, “1, 2, 8.”

§ 19. Signature by agent—authority—how shown.—The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

Variant readings.—In Kentucky the words “an agent duly authorized in writing” are substituted for “duly authorized agent.” Speaking of this change, the Court of Appeals of that state said in a late case: “The reason for adopting the section that appears in the law in place of the proposed section [that is, proposed by the Commissioners on Uniform Laws] is not known; but that the present section is radically different in its meaning from the proposed section is manifest. The section as proposed simply contained the declaration in statutory form of an old and well recognized principle of the law of agency generally, as well as in the law of agency as applied to commercial paper, while the section as amended prescribes that the authority of the agent must

be in writing. • • • It may not have been a wise change to have made. It may in some instances work harm and injustice in the administration of the law, but if so, the remedy is with the legislature and not the courts." *Finley v. Smith*, 165 Ky. 445.

Proof of agency.—This section permits proof of the ostensible authority of the agent to act for his principal. *Grant County State Bank v. Northwestern Land Co.*, 28 N. D. 479. But what shall constitute sufficient proof of such ostensible authority is left to the common law. *In re Estate of Chismore*, 166 Iowa 217.

§ 20. Signature on behalf of principal—personal liability—liability of person signing as agent, etc.—Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

Variant readings.—In Virginia the words "without disclosing his principal" are interpolated after the words "representative capacity" and before the word "he."

Liability of person signing without authority.—In the original draft submitted to the Conference of Commissioners on Uniformity of Laws this section read as follows: "Where a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument; but the mere addition of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. In determining whether a signature is that of the principal or of the agent by whose hand it is written, that construction is to be adopted which is most favorable to the validity of the instrument." This is the English rule, and was the rule in New York prior to the statute. Under that rule a person signing for or on behalf of a principal was not liable *on the instrument*, notwithstanding he had no authority

to bind his principal. There was an implied warranty on his part that he possessed such authority, and if he did not, he became liable upon such warranty for the damages resulting from the breach. *Miller v. Reynolds*, 92 Hun, 400. But no action could be maintained against him on the instrument, when by its terms it did not purport to bind him. And his liability upon the implied warranty did not accompany the transfer of the instrument, unless the claim founded upon the warranty was also assigned to the person to whom the instrument was transferred. (Id.) The effect of the section, as it now stands, is, probably, to permit the holder to sue the agent on the instrument, if he was not duly authorized to sign the same on behalf of the principal.

Words which are descriptio personae.—Thus, he is not relieved from liability by adding the descriptive term “trustee,” *Bank v. Looney*, 99 Tenn. 278, or “administrator,” or “guardian,” *Emm v. Carroll*, 1 Yerger, 144; *McWherter v. Jackson*, 10 Humphrey, 208; *Carter v. Wolf*, 1 Heisk, 674, or “agent,” *Sumwalt v. Rigeley*, 20 Md. 107, or “secretary,” *Daniel v. Glidden*, 38 Wash. 556. Where a negotiable promissory note has been given for the payment of a debt contracted by a corporation, and the language of the promise does not disclose the corporate obligation, and the signatures to the paper are in the names of individuals, a holder, taking *bona fide* and without notice of the circumstances of its making, is entitled to hold the note as the personal undertaking of its signers, notwithstanding they affix to their names the title of an office. Such an affix will be regarded as descriptive of the persons, and not of the character of the liability. Unless the promise purports to be by the corporation, it is that of the persons who subscribe to it; and the fact of adding to their names an abbreviation of some official title has no legal signification as qualifying their obligation, and imposes no obligation upon the corporation whose officers they may be. This rule is founded on the general principle that in a contract every material thing must be definitely expressed and not left to conjecture. Unless the language creates, or fairly implies, the undertaking of the corporation, or if the purpose is equivocal, the obligation is that of its apparent makers. *Casco National Bank v. Clark*, 139 N. Y. 307, 310; *First Nat. Bank v. Wallis*, 150 N. Y. 455. In *Megowan v. Peterson*, 173 N. Y. 1, it was held that a trustee of an insolvent firm, for the benefit of creditors thereof, ap-

pointed by such firm and its creditors, is not personally liable under this section, upon a note signed by him as "trustee," but without disclosing his representative capacity upon the face of the note, where the payee is one of such creditors and the consideration for which the note was given was property purchased from the payee for the benefit of the trust estate. The court, speaking of this provision of the statute, said: "We do not understand that the statute to which we have alluded was designed to change the common-law rule in this regard, which is to the effect that, as between the original parties and those having notice of the facts relied upon as constituting a defense, the consideration and the conditions under which the note was delivered may be shown." See also *Kerby v. Ruegamer*, 107 App. Div. (N. Y.) 491; *Crandall v. Rollins*, 83 Id. 618; *Jump v. Sparling*, 218 Mass. 324.

Signatures of corporate officers.—The cases in which this section has been applied have been mainly cases where the signatures were made by officers of corporations. Under the provisions of this section, which is merely a legislative declaration of the common law rule, an officer of a corporation, who, after the name of the corporation written or stamped as the maker of the note, signs his name without any qualification or description, or without adding his official title is *prima facie* personally responsible on the note. *Belmont Dairy Co. v. Thrasher*, 124 Md. 320. And the use of the form "we promise to pay," suggests that it was the intention that he was to be personally bound. (Id.) And if he signs his own name after that of the corporation merely to complete the signature of the corporation, and not with the intention of making himself personally liable, he must, in order to escape liability, make it appear that such was the understanding of the parties when the paper was issued. (Id.) Where the name of a religious corporation indorsed upon its promissory note was followed by the names of its president and treasurer, the words "finance committee" and the names of the persons constituting such committee, the indorsement was held to come within this section, and to negative any personal liability on the part of the individual signers. *Chelsea Exchange Bank v. First U. P. Church*, 89 Misc. (N. Y.) 616.

Parol evidence to show representative character.—The statute does not abrogate the rule of evidence which permitted the person signing to show that it was not the intention of the parties that he should be personally bound. *Phelps v. Weber*, 84 N. J. Law 630;

Jump v. Sparling, 218 Mass. 324; *Myers v. Chesley*, 177 S. W. Rep. 326; *Dunbar Box & L. Co. v. Martin*, 53 Misc. (N. Y.) 312.

§ 21. Signature by procuration — effect of.—A signature by “procuration” operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

Variant reading.—In Illinois the word “only,” after the word “bound,” is omitted.

Meaning of term per procuration.—The words “per procuration” have a special technical significance. They are an express intimation of a special and limited authority; and a person taking a bill so drawn, accepted, or indorsed, is bound to inquire into the extent of the authority. *Byles on Bills*, 33. But an indorsement by an agent “per pro” which is within the powers conferred upon him is binding upon his principal as against *bona fide* holders for value, though the agent abused his authority. *Bryant v. La Banque du Peuple* [1893], *App Cases*, 170. The term is seldom, if ever, used in this country.

§ 22. Indorsement by infant or corporation — effect of.—The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

Variant reading.—In North Carolina the words “or married woman” are inserted after the word “infant” in both places.

Indorsement by corporation.—Thus, if a note should be drawn payable to the order of a corporation, and the corporation should indorse the same without consideration, such indorsement would pass the title to a subsequent holder with notice of the facts, though the corporation would not be liable to him as an indorser. See note to section 29.

Indorsement by infant.—The statute changes the law. See *Roach v. Woodhall*, 91 Tenn. 206. The change, like others, was made to facilitate the ready and safe transfer of commercial paper.

§ 23. Forged signature inoperative — estoppel.—

Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

Variant reading.—In Illinois the words “ of the person whose signature it purports to be ” are omitted.

Unauthorized signature.—For cases applying the statute, see *Seaboard Nat. Bank v. Bank of America*, 193 N. Y. 26; *Mercantile Nat. Bank v. Silverman*, 148 App. Div. (N. Y.) 1; *Stein v. Empire Trust Co.*, Id. 850; *Jett v. Standafer*, 143 Ky. 787.

Where some of the signatures are genuine.—But it does not follow from the provisions of this section that proof of one forged signature on a note must of necessity, and in all cases, be given effect to avoid the note in favor of those whose signatures thereto are found to be genuine. It is the forged or unauthorized signature that is declared to be inoperative; and the inhibitory clause forbids recovery on the instrument as against any party where the right of recovery is predicated on such inoperative signature. *Beem v. Farrell*, 135 Iowa, 670.

Diversion of paper by agent indorsing.—The agent of the plaintiff who had power of attorney to receive and indorse checks for the plaintiff and to deposit them in certain banks, indorsed them with the name of the plaintiff, to whom they were payable, adding his own indorsement, and transferred them to certain stockbrokers with whom he was speculating, as margins on his personal transactions, the brokers having knowledge of the agency. *Held*, that the unauthorized diversion of the checks by the agent, after indorsement, did not make the original indorsement of the plaintiff's name a forgery under this section. *Salen v. Bank of State of New York*, 110 App. Div. (N. Y.) 636.

Mistake as to identity of payee.—P, by fraudulently representing himself to be H, obtained a check from T, payable to the order

of H. At the time, T knew of the existence of H, and delivered the check to P supposing that he was H. P indorsed H's name on the check, and gave it to D, who collected the money thereon from the bank, which charged the same against the account of T. *Held*, that under this section the signature made by P transferred no interest, and that T could recover the amount from the bank. *Tolman v. American National Bank*, 22 R. I. 462. *Stiness, C. J.* said: "We have referred to authorities because the defendant's counsel so earnestly and ably argued that the act did not alter the law-merchant that it seemed proper to show that the law in this respect, outside of the act, is in a very unsatisfactory state and that the act is right. We do not think that the act does alter the law as it was when, a few years ago, it seems to have been switched off on a fallacy in some places. One of the advantages of the act is in settling the question. Waiving the question of forgery, about which the cases we have cited differ, the signature in this case is clearly one 'made without the authority of the person whose signature it purports to be,' and, therefore, it is 'wholly inoperative.' This being so, the defendant cannot justify its action under it, there being no evidence of any conduct by the plaintiff to mislead the defendant and so to estop his present claim. As the case stood, the plaintiff had ordered money paid to Haskell. The bank had not so paid it. The fact that the plaintiff had been imposed upon did not relieve the bank from its duty to see that the money was paid according to order." But where the instrument is intended for the person to whom it is delivered, his indorsement will pass a good title to a holder in due course, though he procured the same by falsely representing himself to be another person of the same name. *Jamieson v. McFarland*, 43 Wash. 153. The difference between the two cases is, that in the former, the drawer of the check or draft intends it for a particular person other than the one to whom he delivers it; in the latter case, the person to whom he delivers it is, in fact, the one for whom he intended it. Compare *Land, etc. Co. v. Northwestern Nat. Bank*, 196 Pa. St. 230. See note to section 9.

Ratification—Estoppel.—Where the transaction is contrary to good faith and the fraud affects individual interests only, ratification is allowed; but where the fraud is of such a character as to involve a crime the adjustment of which is forbidden by public policy, the ratification of the act from which it springs is not permitted. Forgery does not admit of ratification. A forger does

not act on behalf of, nor profess to represent, the person whose handwriting he counterfeits; and the subsequent adoption of the instrument cannot supply the authority which the forger did not profess to have. *Henry Christian Building and Loan Association v. Walton*, 181 Pa. St. 201; *Lyon v. Phillips*, 106 Pa. St. 57. But cases sometimes arise where parties are estopped to dispute the genuineness of their signatures. *Crout v. DeWolf*, 1 R. I. 393. Thus, where a customer has been guilty of negligence in examining the account and vouchers returned to him by his bank, he will not be permitted to dispute the account because some of the checks are forgeries. *Leather Manufacturers' Nat. Bank v. Morgan*, 117 U. S. 96. Where one whose name has been forged to a note has received no benefit from the forgery, and the forger was not his agent for any purpose, he is not bound, as a matter of legal duty, when the note is first shown to him, to repudiate or disclaim at once the genuineness of the signature. His failure to do so is evidence, in the nature of an admission, which may be considered as bearing upon the question whether he assumed the signature as his own, but it is not conclusive. *Traders' National Bank v. Rogers*, 167 Mass. 315. As to what conduct will amount to an estoppel, see *Terry v. Bissel*, 26 Conn. 41; *Pettyjohn v. Nat. Ex. Bank*, 101 Va. 111. A married woman, to shield her husband, ratified a signature on a promissory note to a bank, purporting to be hers but forged by her husband. At maturity the note was surrendered to the husband on his giving in renewal a note similarly forged which was accepted in good faith by the bank. In an action by the bank on the first note, it was held, that the substitution and acceptance of the second forged note did not constitute a payment, so as to bar an action on the note ratified by the defendant. *Central National Bank v. Copp*, 184 Mass. 328.

Traveler's checks.—A banking company issuing traveler's checks, which are first signed by the payee, and are to be paid by the correspondent of the drawer when countersigned by the payee, is liable to the payee for the value of such a check lost or stolen, and paid by the drawer on the forged countersignature of the payee. *Sullivan v. Knauth*, 161 App. Div. (N. Y.) 148.

ARTICLE III.**CONSIDERATION.****Section 24. Presumption of consideration.**

25. What constitutes value.
26. Value given by prior holder.
27. Lienor as holder for value.
28. Failure of consideration.
29. Accommodation party—definition—liability.

§ 24. Presumption of consideration.—Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

Importance of presumption.—In *Lassas v. McCarty*, 47 Ore. 474, it was said that the presumption of the statute that a promissory note was given for a sufficient consideration is of much importance in business transactions, and should not be lightly disregarded, in favor of those who have carelessly, or by being unduly confiding, set afloat commercial paper.

Words "value received."—The words "value received," commonly used in notes and bills, are surplusage in a negotiable instrument; for their omission does not in any way affect the legal import of the paper, or weaken the presumption that it was given for value. *McLeod v. Hunter*, 29 Misc. (N. Y.) 559. But in the case of a non-negotiable instrument, they are important, for they amount to an admission that the instrument was issued for a sufficient consideration. *Owen v. Blackburn*, 161 App. Div. (N. Y.) 827; *Du Bosque v. Munroe*, 168 Id. 821.

Pleading—Burden of proof.—It is not necessary for the plaintiff to allege that there was a consideration, since that is presumed. *First Nat. Bank v. Stallo*, 160 App. Div. (N. Y.) 702.

And the production of the paper establishes *prima facie* that there was a consideration. Dawson v. Wombles, 123, Mo. App. 340; Bank of Monticello v. Dooly, 113 Wis. 590, 593; Hickok v. Bunting, 92 App. Div. (N. Y.) 167; Bringman v. Von Glahn, 71 Id. 537; Lynchburg Milling Co. v. Nat. Exchange Bank, 109 Va. 639; Carter v. Butler, 264 Mo. 306; Murphy v. Estate of Skinner, 160 Wis. 554; Hamilton v. Diefenderfer, 21 Wyo. 66. But when this presumption is met by proof tending to rebut it, then, on the question whether there was a consideration, the burden of proof is on the holder throughout the trial. Lombard v. Byrne, 194 Mass. 236, 238. As to the effect of a failure to deny that the paper was given for value, see Benedict v. Kress, 97 App. Div. (N. Y.) 65.

§ 25. What constitutes value — antecedent debt.—Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

Variant readings.—In Illinois the second sentence reads as follows: "An antecedent or pre-existing claim, whether for money or not, constitutes value where an instrument is taken either in satisfaction therefor or as security therefor, and is deemed such, whether the instrument is payable on demand or at a future time." In Wisconsin the words "discharged, extinguished or extended" are interpolated after the words "pre-existing debt;" and the following is added at the end of the section: "But the indorsement or delivery of negotiable paper as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value."

Non-negotiable bills and notes.—While the statute applies only to instruments which are negotiable, yet by the law merchant a bill of exchange, though it lacks the words payable "to order" or to "bearer," which are essential to negotiability (see section 2) imports a consideration, and the statute has not altered this rule, since it provides that in any case not provided for in the act, the law merchant shall govern. (Section 196.) But as regards the presumption of consideration in the case of non-negotiable notes,

the law of New York and some of the other states has been changed. See note to section 184.

What constitutes value.—See *Conover v. Stillwell*, 34 N. J. Law, 54; *Eaton v. Libbey*, 165 Mass. 218; *Whitney v. Clary*, 145 Mass. 156; *Shawmut Nat. Bank v. Manson*, 168 Mass. 425; *Raymond v. Sellick*, 10 Conn. 480.

Antecedent debt—Common-law rule.—The general rule is that where a conveyance is made or security taken, the consideration of which is an antecedent debt, the grantee or the person taking the security is not regarded as a purchaser for a valuable consideration. *People's Savings Bank v. Bates*, 120 U. S. 556, 565; *Weaver v. Borden*, 49 N. Y. 286; *Cary v. White*, 52 N. Y. 138; *Wood v. Robinson*, 22 N. Y. 567; *Mingus v. Condit*, 23 N. J. Eq. 313. But in the Supreme Court of the United States, and in many of the State courts, a distinction was made in favor of commercial paper, and the rule adopted that a *bona fide* holder taking a negotiable instrument in payment of, or as security for, an antecedent debt, is a holder for a valuable consideration entitled to protection against all the equities between the antecedent parties. *Railroad Company v. National Bank*, 102 U. S. 14; *Swift v. Tyson*, 16 Pet. 1; *National Revere Bank v. Morse*, 163 Mass. 381; *Rockville Nat. Bank v. Citizens' Gas Light Co.*, 72 Conn. 576; *Roberts v. Hall*, 37 Conn. 205; *Bridgeport City Bank v. Welch*, 29 Conn. 475; *Harrold v. Kays*, 64 Mich. 439; *Fitzgerald v. Booker*, 96 Mo. 661; *Spencer v. Sloan*, 108 Ind. 183; *Quinn v. Hoord*, 43 Vt. 375; *Armour v. McMichael*, 36 N. J. Law, 92; *Fisher v. Fisher*, 98 Mass. 303; *Roberts v. Hall*, 37 Conn. 205; *Giovanovich v. Citizens' Bank*, 26 La. Ann. 15; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540; *Robins v. Lair*, 31 Iowa, 9; *Hotchkiss v. Fitzgerald Patent, etc., Co.*, 41 W. Va. 357; *Fair v. Howard*, 6 Nev. 304; *Levy v. Ford*, 41 La. Ann. 873. This exception to the general rule was based upon considerations of commercial policy, and was peculiar to commercial paper. But prior to the adoption of the statute, it was well settled in New York and several other states, that one who acquired commercial paper as collateral security for a pre-existing debt was not a holder for value. *Comstock v. Hier*, 73 N. Y. 269; *McBride v. Farmers' Bank*, 26 N. Y. 450; *Coddington v. Bay*, 20 Johns. 637; *Schaeffer v. Fowler*, 111 Pa. St. 451; *Martin v. Bank*, 94 Tenn. 176; *Roach v. Wodall*, 91 Tenn. 206; *Jenkins v. Schnaub*, 14 Wis. 1; *Brooks v. Sullivan*, 129 N. C. 190.

This rule produced many subtle refinements, and it would be impossible to reconcile all the decisions on the subject. See note to next section. For the former law in the case of accommodation paper pledged as security, see *Stephen v. Monongahela National Bank*, 88 Pa. St. 157; *National Union Bank v. Todd*, 132 Pa. St. 312.

Draft purchased for antecedent debt.—Under this section a bank which acquires a draft by purchase from another bank for an existing indebtedness is a holder for value. *Murchison Nat. Bank v. Dunn Oil Mills*, 150 N. C. 718, 719.

Exchange of notes.—One promissory note is a good consideration for another given in exchange. *Franklin Bank v. Roberts*, 168 N. C. 473; *Mehlinger v. Harriman*, 185 Mass. 245.

Promise to pay debt.—The promise to pay an already existing debt, or the actual payment thereof, is not “value” within the meaning of this section. *Morris County Brick Co. v. Austin*, 79 N. J. Law, 273.

Giving credit.—Under this section a bank which merely gives a customer credit on its books for paper deposited does not become a holder for value, but in order to have this effect, the credit must be drawn upon. *Commercial Nat. Bank v. Citizens’ State Bank*, 132 Iowa, 706; *Miller v. Norton*, 114 Va. 610; *Elgin City Banking Co. v. Hall*, 119 Tenn. 548. See note to section 52.

Accommodation paper.—A pre-existing debt, without extension or forbearance, is a sufficient consideration upon which to hold an accommodation party where there has been no restriction placed upon the use of the paper. *Lehrenkrauss v. Bonnell*, 199 N. Y. 240; *Maurice v. Fowler*, 78 Misc. (N. Y.) 357.

§ 26. Value given by prior holder.—Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time.

Consideration for subsequent acceptance.—If a party becomes a *bona fide* holder for value of a bill before acceptance, it is not essential to his right to enforce it against a subsequent acceptor

that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. The drawee can, of course, upon presentment refuse to accept, and in that event the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept the bill, he becomes primarily liable for its payment, not only to the indorsees, but also to the drawer himself. *Heuermatte v. Morris*, 101 N. Y. 70; *National Park Bank v. Saitta*, 127 App. Div. (N. Y.) 624.

§ 27. Lienor a holder for value — to what extent.—Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value, to the extent of his lien.

Effect of the statute.—In New York for some time after the adoption of the statute, there was a tendency in the Appellate Divisions of the First and Second Departments to hold that the statute had not changed the rule which had prevailed in this state since the decision in *Coddington v. Bay* (20 Johns. 637), that one who had acquired commercial paper as collateral security for a pre-existing debt was not a holder for value. *Sutherland v. Mead*, 80 App. Div. (N. Y.) 103; *Roseman v. Mahony*, 86 App. Div. (N. Y.) 377; *Bank of America v. Waydell*, 103 App. Div. (N. Y.) 25, 33. But the later New York cases, without expressly overruling these decisions, have held that the statute established the rule which had prevailed in the Federal Courts, viz.: that the transfer of a bill or note as security for an antecedent debt is sufficient to constitute the transferee a holder for value. *King v. Bowling Green Trust Co.*, 145 App. Div. 398, 402; *Maurice v. Fowler*, 78 Misc. Rep. 357; *Martin L. Hall Co. v. Todd*, 139 N. Y. Supp. 111; *Broderick & Bascom Rope Co. v. McGrath*, 81 Misc. 199, 200. See also *Brewster v. Shrader*, 26 Misc. Rep. 480. In the case last cited, Judge Werner, now of the New York Court of Appeals, said: "The language of this section, when given its usual and ordinary signification, ought to leave no room for doubt upon the subject. There is, however, such a universal disposition among lawyers to look for some hidden or subtle meaning in the

most simple language, that it has become quite the fashion to require the courts to construe statutes, which, to the average lay mind, seem to require no construction. If the language of the section under consideration were not obviously clear and unequivocal, and there were need of ascertaining the legislative intent in order to give proper effect to such language, the history of the subject, of the judicial decisions in England and the states of this country, and of the proceedings of the commission on uniformity of laws, leave no possible doubt as to the purpose of this section." And after reviewing the history of the statute the learned judge continued: "It seems evident, therefore, from the history of this subject, as well as from the obvious purpose for which this statute was enacted, no less than from the language of the statute itself, that the New York rule, so called, has been modified so as to conform to the rule in England and in our Federal court of last resort." And in all the other states where the question has arisen, the courts have held that the legislative intent to establish the federal rule is clear. *Bruner v. New Universal Fertilizer Co.*, 218 Mass. 300; *Lowell v. Bickford*, 201 Mass. 543; *Voss v. Chamberlain*, 139 Iowa, 569; *Graham v. Smith*, 155 Mich. 65; *Elk Valley Coal Co. v. Third Nat. Bank*, 157 Ky. 617; *Brooks v. Sullivan*, 129 N. C. 190; *Payne v. Zell*, 98 Va. 294; *Felt v. Bush*, 41 Utah, 467; *German Amer. State Bank v. Lyons*, 127 Minn. 390; *National Bank of Commerce v. Morris*, 156 Mo. App. 51, 52; *Smathers v. Toxaway Hotel Co.*, 162 N. C. 346; *German-Am. Bank v. Wright*, 148 Pac. Rep. (Wash.) 769; *Melton v. Pensacola Bank & Trust Co.*, 190 Fed. Rep. 126, 111 C. C. A. 166; *Lust Co. v. Markee*, 179 Fed. 764. When the provisions of section twenty-seven are considered together with the provisions of section twenty-five the intent seems to be clear. The holder, who has taken the paper as collateral security, very plainly has a lien upon it, and, therefore, is within the terms of section twenty-seven. The only question then is, whether he must be excluded from the operation of this section merely because his lien was acquired for an antecedent indebtedness. But as the statute in another place expressly declares that "an antecedent or pre-existing debt constitutes value" (sec. 25) there is no warrant for reading any such exception into the section.

Extent of Lien.—Thus, a bank, having in its possession negotiable securities of its customer, would be, by virtue of its general

lien, a holder for value to the extent of the balance due from such customer. So, any person to whom negotiable securities are pledged as collateral would be a holder for value to the extent of the amount due to him. *Wilkins v. Usher*, 123 Ky. 696; *Fifth Nat. Bank v. McCrory*, 177 S. W. Rep. (Mo. App.) 1058. But if such securities should be sold to pay such balance or debt, the purchaser, if a holder in due course within section 52, though he should pay less than their face value for them, could enforce them for the full amount thereof. See section 57.

Right to sue.—Under sections 27 and 51 a person who holds a note or bill as collateral security may sue thereon. *Mersick v. Alderman*, 77 Conn. 634; *American Nat. Bank v. Hill*, 85 S. E. Rep. (N. C.) 209.

Amount of recovery.—Ordinarily the pledgee is entitled to recover the full amount due on the instrument, with liability to account for the surplus to the pledgor. *Camden Nat. Bank v. Fries-Breslin Co.*, 214 Pa. St. 395. But if the pledgor could not recover upon the instrument, then the extent of the recovery will be limited to the amount of the debt due to the pledgee. *Benton v. Likyta*, 84 Neb. 808; *Elk Valley Coal Co. v. Third Nat. Bank*, 157 Ky. 617. See also *Stoddard v. Kimball*, 6 Cush. 469; *Fisher v. Fisher*, 98 Mass. 303; *Chicopee Bank v. Chapin*, 8 Metc. 40. The principle upon which the rule is founded is that, in such case, the pledgee would hold the surplus for the pledgor, and as the paper in the hands of the pledgor is void, all that ought to be recovered by the pledgee is the amount due him. *Burner v. New Universal Fertilizer Co.*, 218 Mass. 300.

Where principal debt not due.—The fact that the principal obligation was not due at the time of bringing the suit is no defense; for the pledgee has the right to enforce the collection of a collateral note, even though the principal debt is not yet due. *Elk Valley Coal Co. v. Third Nat. Bank*, 157 Ky. 617.

§ 28. Failure of consideration — partial failure.—Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

Where plaintiff not holder in due course.—As against any person not a holder in due course, while the paper itself is *prima facie* evidence of the consideration, the question of consideration is always open; and it is competent for the defendant to show by parol that there was no sufficient consideration, or that the consideration has failed. *Hermann v. Combs*, 119 Md. 41; *Tatum v. Commercial Bank*, 185 Ala. 249; *Batterman v. Dutcher*, 95 App. Div. (N. Y.) 213; *Ferguson v. Netter*, 141 Id. 274; *Cowee v. Cornell*, 75 N. Y. 91, 98; *Anthony v. Valentine*, 130 Mass. 119; *Ingersoll v. Martin*, 58 Md. 67; *Corlies v. Howe*, 11 Gray, 125; *Brenneman v. Furniss*, 90 Pa. St. 186. But under the express terms of the statute failure of consideration is not a defense as against a holder in due course. *Franz v. Schiro*, 136 La. 842; *Interstate Finance Co. v. Schroder*, 74 W. Va. 67.

Burden of proof.—Under the statute, the burden of proving failure of consideration is on the party alleging it. *Piner v. Brittain*, 165 N. C. 401; *Bank of Gresham v. Walch*, 157 Pac. Rep. (Ore.) 534; *Bringman v. Von Glahn*, 71 App. Div. (N. Y.) 537; *Carter v. Butler*, 264 Mo. 306, 330. And this was the rule prior to the adoption of the statute. *Jennison v. Stafford*, 1 Cush. 168. Total failure of consideration does not impose upon an innocent holder the burden of proving that he gave value for the paper. *Wilson v. Lazier*, 11 Gratt. 477; *Albrecht v. Atrimpler*, 7 Pa. St. 476.

Negotiability.—The failure of consideration does not affect the negotiability of the instrument. *Dingman v. Amsink*, 77 Pa. St. 114.

Renewal.—If at the maturity of a negotiable promissory note which was without consideration, the maker makes a partial payment thereon and gives a new note for the balance, the new note is without consideration,) and no action can be maintained thereon by the payee against the maker. *Seager v. Drayton*, 218 Mass. 571.

Estoppel.—The maker of a note who induces another to purchase it from the payee, assuring him that it is valid and will be paid, cannot set up the illegality of the consideration against the assignee. *Holzbog v. Bakrow*, 156 Ky. 161.

Where instrument is past due.—The mere fact that an accommodation note was transferred by the party accommodated after

due to a holder for value, does not permit the maker to defeat recovery upon the ground that the note was for accommodation and without consideration moving to him. *Marling v. Jones*, 138 Wis. 82, 90.

Exchange of notes.—Upon an exchange of promissory notes, each note is a valid consideration for the other, and is fully available in the hands of the holder; and the fact that one of the notes is not paid at maturity does not sustain a defense of failure of consideration in an action upon the other. *Rice v. Grange*, 131 N. Y. 149; *Woman v. Frost*, 52 N. Y. 422.

Partial failure of consideration.—See *Black v. Rigway*, 131 Mass. 80; *Cline v. Miller*, 8 Md. 274; *Davis v. Wait*, 12 Oregon, 425.

Unliquidated claims.—The rule, both in this country and in England, has been that whenever the defendant is entitled to go into the question of consideration he may set up the partial, as well as the total, want of consideration. *Daniel on Negotiable Instruments*, § 210. But it has been held in some cases that the part alleged to have failed must be distinct and definite, for only a total failure or the failure of a specific and ascertained part can be availed of by way of defense; and in the case of an unliquidated claim the party must resort to his cross action. *Pulseifer v. Hotchkiss*, 12 Conn. 234; *Drew v. Towle*, 7 Fost. 412; *Moggridge v. Jones*, 14 East. 485; *Trickey v. Larne*, 6 M. & W. 278. In other cases it is held that the defendant may recoup his damages though they be unliquidated. *Davis v. Wait*, 12 Oregon, 425; *Wyckhoff v. Runyon*, 33 N. J. Law, 107. As to what is necessary to constitute one a holder in due course, see sections 53-57.

By what law governed.—The right to interpose the defense of want of consideration is governed by the *lex loci*. *Herdic v. Roesler*, 109 N. Y. 127, 133.

§ 29. Accommodation party — definition — liability.
—An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, not-

withstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

Variant reading.—In Illinois the words “without receiving value therefor, and,” after the word “indorser” are omitted, and the following is added at the end of the section: “And in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity.”

Meaning of terms.—The words “without receiving value therefor” in section fifty-five refer to the instrument itself, and not to the loan of the name by way of accommodation. *Morris County Brick Co. v. Austin*, 79 N. J. Law, 273.

Basis of the rule.—An accommodation note, in the strict sense, is a loan of the maker's credit, without instructions as to the manner of its use. *Lenheim v. Wilmarding*, 55 Pa. St. 73; *Bankers' Iowa State Bank v. Mason Hand Lathe Co.*, 121 Iowa, 570, 572. He cannot set up as a defense that it was given without consideration; for this would defeat the very purpose for which it was made. *Carpenter v. National Bank of the Republic*, 106 Pa. St. 170, 172. In respect to third persons, the law considers him in the character he has assumed, and will not permit him to allege that the paper to which he gave his name was an imposition, nor to gainsay its reality by proof that it was a fiction. It shall be taken *pro veritate* that he was the maker, for *de veritate* that was the very thing he was intended to be. *Bank of Montgomery County v. Walker*, 9 S. & R. 229; *Stephen v. Monongahela National Bank*, 88 Pa. St. 157, 162-3. And this is the rule though the note be pledged merely as collateral security for the debt of the payee. *Lord v. Ocean Bank*, 20 Pa. St. 384.

Right to retract.—An accommodation indorser has the right to retract his indorsement at any time before the paper is negotiated. His consent to be indorser is necessary to make him such. He cannot be compelled to indorse whether he will or no; and as the instrument is a mere blank piece of paper until it passes into other hands for valuable consideration, it follows that he has the same right to retract the indorsement already made as he had to refuse his indorsement in the first instance; that is, his indorsement and his continuing to be so are alike voluntary until rights arise by the

negotiation to third parties. *Berkely v. Tinsley*, 88 Vt. 1001, 1004. And the purchaser of an accommodation note, after its maturity, gets no better nor greater right to enforce it against the maker or indorser than if it were ordinary negotiable paper given for value. *Cottrell v. Watkins*, 89 Va. 801.

Exchange of notes.—A mutual exchange of notes will amount to a sufficient consideration, so that the notes will not be regarded as accommodation paper. *Williams v. Banks*, 11 Md. 198; *Rice v. Grange*, 131 N. Y. 149; *Woman v. Frost*, 52 N. Y. 422.

Married woman as accommodation party.—The statute does not change the law of New Jersey so as to validate the contract of a married woman obligating her as surety for her husband or to pay the debt of another person. *People's Nat. Bank v. Schepflin*, 73 N. J. Law, 29, 38. In Massachusetts, on the other hand, since the Negotiable Instruments Act, as well as before, if a married woman indorses for accommodation the note of a partnership of which her husband is a member payable to him and indorsed also by him, she is liable on her contract of indorsement to a bank to which her husband acting for the partnership negotiates the note. *Middleborough National Bank v. Cole*, 191 Mass. 168.

Corporations as accommodation parties.—The provision of the statute does not apply to corporations, which, as a general rule, are without power to bind themselves as accommodation parties. A national bank has no such power, *National Bank of Commerce v. Atkinson*, 55 Fed. Rep. 465, 27 U. S. App. 88; nor has a state bank, *The Bank of Genesee v. The Patchin Bank*, 13 N. Y. 309; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 128; *Morford v. The Farmers' Bank of Saratoga County*, 26 Barb. 568; nor a manufacturing corporation, *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154; *The Central Bank v. The Empire Stone Dressing Co.*, 26 Barb. 23; *The Bridgeport City Bank v. The Empire Stone Dressing Co.*, 30 Barb. 421; *The Farmers' & Mechanics' Bank v. The Empire Stone Dressing Co.*, 4 Bosw. 275; *Wahlig v. The Standard Pump Manufacturing Co.*, 25 N. Y. St. Rep. 864; *Filon v. The Miller Brewing Co.*, 38 N. Y. St. Rep. 602; *National Bank of Newport v. Snyder Manufacturing Co.*, 117 App. Div. (N. Y.) 371; *Monument National Bank v. Globe Works*, 101 Mass. 57; nor a railroad company, *Davis v. Old Colony Railroad Company*, 131 Mass. 258; *J. G. Brill Co. v. Norton & Taunton St.*

Ry. Co., 189 Mass. 431; nor a warehousing and security company, *The National Park Bank v. G. A. M. W. & S. Co.*, 116 N. Y. 281; nor a life insurance company, *Aetna National Bank v. Charter Oak Life Insurance Company*, 50 Conn. 167; nor a turnpike company, *Hall v. Auburn Turnpike Co.*, 27 Cal. 256; nor an oil company, *Culver v. Reno Real Estate Company*, 91 Penn. St. 367. No corporations organized under the statutes of New York are authorized to bind the property of their shareholders by accommodation indorsements. *Fox v. Rural Home Co.*, 90 Hun, 365, 367. But a corporation having a general power to issue negotiable paper, and to indorse the same for its own benefit in the course of its business, will be liable on its accommodation indorsement when the paper passes into the hands of a *bona fide* holder for value before maturity, without notice of the character of the indorsement. *Cox & Sons Co. v. Northampton Brewing Co.*, 245 Pa. St. 418; *Central Trust Co. v. Smurr & Kamen Co.*, 191 Ill. App. 613. And a corporation, having either express or implied power to issue negotiable paper, is presumed to act within the scope of such power; and hence there is a presumption in favor of the validity of negotiable paper issued by it. *Id.* See also *Howard v. Boorman*, 17 Wis. 459; *Lehigh Valley Coal Co. v. West Depere Agr. Works*, 63 Wis. 45. When, in an action upon a promissory note, it is shown without dispute that the defendant, a manufacturing corporation, made a note for the accommodation of the payee, another corporation, and that the notes were renewed from time to time by the payee, which always paid the discount, the defendant is entitled to a ruling that the paper is accommodation paper within the terms of the statute, and it is error to submit that question to the jury. *Nat. Bank of Newport v. Snyder Manufacturing Co.*, 117 App. Div. (N. Y.) 370.

Burden of proof where corporation sought to be held.—On proof that the corporation became a party to the paper for accommodation, the holder has the burden of showing that he became such holder for value, and without notice that the corporation was an accommodation party. *Abbot v. LePrevost*, 166 App. Div. (N. Y.) 40; *Jacobus v. Jamestown Mantel Co.*, 211 N. Y. 154.

Notice where paper negotiated for officer's benefit.—Where an officer of a corporation who has executed a note on behalf of the corporation negotiates the same for his individual benefit, the

holder is put upon inquiry. *Ward v. City Trust Co.*, 192 N. Y. 61. And the fact that another officer joins in the execution of the paper does not relieve the holder from the duty of making inquiry. *Newman v. Newman*, 160 App. Div. (N. Y.) 331.

Partner indorsing for accommodation.—An indorsement by a partner of his separate accommodation note with the name of his firm is a sufficient indication of the nature of the transaction to make it the duty of the bank which discounts it to inquire into his authority to use the firm name for the occasion, unless there are circumstances from which the authority can be implied. *Tanner v. Hall*, 1 Pa. St. 417.

Right to impose conditions.—The statute does not change the rule that an accommodation party has the right to determine for himself what use shall be made of the instrument which he signs. He may impose material or immaterial conditions and terms, and no person can enforce the instrument against him who takes it in violation of such terms and conditions and with notice thereof. *Benjamin v. Rogers*, 126 N. Y. 60. Thus, where the defendant indorsed a note upon the condition that it should not be negotiated in New York, assigning as a reason that he did not wish to be sued upon it in the state, it was held that, while the restriction did not seem to be material, yet the diversion was a defense to the indorser as against one who was not a holder for value. *United States Nat. Bank v. Ewing*, 131 N. Y. 506. But see *Rogers v. Sipley*, 35 N. J. Law, 86.

Knowledge of holder that paper was for accommodation.—For cases in which this provision of the statute has been applied, see *Packard v. Windholz*, 88 App. Div. (N. Y.) 365; *Smith v. State Bank*, 104 N. Y. Supp. 750; *Black v. First Nat. Bank of Westminster*, 96 Md. 399; *White v. Savage*, 48 Oregon, 604; *Bankers' Iowa State Bank v. Mason Lathe Co.*, 121 Iowa, 570; *Neal v. Wilson*, 213 Mass. 336; *Marling v. Jones*, 138 Wis. 82; *Wilborn v. Hawkins*, 49 Atl. Rep. (R. I.) 856.

Debt of third person.—The statute has not changed the rule of the common law that where one, for the accommodation of a debtor and without consideration, gives his note or check to the creditor of the debtor in payment of, or as security for, the debt due from the debtor to the creditor, he is liable to the creditor on the note or check. *Neal v. Wilson*, 213 Mass. 336. Where one gives a check

to a bank to make good the overdraft of another person, the bank may sue on such check, though it was given at the solicitation of the cashier. *Id.*

Paper past due.—The mere fact that an accommodation note was transferred by the party accommodated after due, to a holder for value does not permit the accommodation maker to defeat recovery at the suit of a holder for value merely upon the ground that the note was accommodation paper, and without consideration moving to the maker. *Marling v. Jones*, 138 Wis. 82.

Order of liability.—Accommodation parties to ordinary commercial paper are liable to each other in succession as their names appear upon the instrument, unless they specially agree that they are to be bound jointly and not severally, in which case they are entitled to contribution as among themselves. *Noble v. Breeman Spaulding Co.*, 65 Oregon, 93. The liability of an accommodation maker and an accommodation guarantor is successive and not concurrent, the liability of such maker being primary and the liability of such guarantor secondary. *Id.* The fact that the accommodation guarantor knew when he executed the guaranty that certain of the makers were accommodation parties, did not, in the absence of a special agreement, make his and their liability concurrent instead of successive. *Id.* See also *Bradley Engineering, etc. Co. v. Heyburn*, 56 Wash. 628.

Where co-maker under disability.—An accommodation maker is liable, although his co-maker, for whose accommodation he signed, successfully pleads his infancy as a defense. *Hodgins v. Northwestern Finance Co.*, 148 Pac. Rep. (Okl.) 717.

Set-off.—The statute has not changed the rule that the indorser of a promissory note made as an accommodation for him and held by a bank which becomes insolvent before the note matures, may elect to have such notes become due and payable at once and set-off against it the amount of his deposit with the bank. *Building & Engineering Co. v. Northern Bank*, 206 N. Y. 400.

Right to subrogation.—As to the right of an accommodation maker to subrogation, see *Jennings v. Wall*, 217 Mass. 278.

ARTICLE IV.

NEGOTIATION.

- Section 30.** What constitutes negotiation.
31. How indorsement made.
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 49. Transfer without indorsement—effect of.
 50. When prior party may negotiate instrument.

§ 30. What constitutes negotiation.—An instrument is negotiated when it is transferred from one person

to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

Meaning of term negotiate.—Respecting the meaning of the word “negotiated” as used in this section, the Supreme Court of Nebraska said in a late case: “Negotiation means the act by which a bill of exchange or promissory note is put into circulation by being passed by one of the original parties to another person. If A gives B a check on C bank, and B presents the check at the counter of C, no negotiation is necessary or had. He simply demands and receives payment; but if B goes to D store and buys a bill of goods and tenders the indorsed check in payment, he negotiates the check. The difference is clear and well defined. The presentation by defendant of the check in controversy *for payment*, was not a ‘negotiation’ of the check within the meaning of the statute quoted. Nor do we think that the payment by a bank of a check drawn upon it, constitutes such bank a ‘holder’ within the meaning of the statute.” *Aurora State Bank v. Hayes Eames Elevator Co.*, 88 Neb. 187, 190. See also *National Bank of Commerce v. Farmers’ & Merchants’ Bank*, 87 Neb. 843; *Scotland Co. Nat. Bank v. Hohn*, 146 Mo. App. 699. Where, after the sale of a traction company’s property, the purchasers deposited notes for the price with a bank, and a cashier’s check was issued payable to the secretary of the traction company, by whom it was indorsed to a trustee, who indorsed it in blank, and left it in the custody of the bank with the notes: *Held*, that the cashier’s check was not negotiated within the meaning of this section. *Seaman v. Muir*, 144 Pac. Rep. (Ore.) 121.

Place of indorsement.—An indorsement is usually written on the back of the instrument, but the place is not essential. If the payee write his name on any part of the instrument, with the intention of indorsing it, that is a sufficient indorsement. *Haines v. Dubois*, 29 N. J. Law, 259. See section 17, subd. 6.

Necessity for delivery.—The indorsement alone without delivery conveys no title. *Dann v. Norris*, 24 Conn. 337; *Clark v. Sigourney*, 17 Conn. 520; *Middleton v. Griffith*, 57 N. J. Law, 442; *Spencer v. Carstarphen*, 15 Colo. 445.

Agreement not to negotiate.—A parol agreement, although entered into at the time of making negotiable paper, that the payee will not negotiate it and will renew it, etc., is inadmissible to vary the effect of the paper. *Benton v. Sikyta*, 84 Neb. 808; *Heist v. Hart*, 73 Pa. St. 286. So, it has been held that evidence of an oral agreement that payment was not to be called for until certain paintings of the maker had been sold is an attempt to vary the written contract. *Wooley v. Cobb*, 165 Mass. 503. See *Woods Son Co. v. Schaefer*, 173 Mass. 443.

Paper payable to person named or bearer.—By former statutes in some states, notes made payable to a person named therein or bearer must have been indorsed to pass the legal title. *Garvin v. Wiswell*, 83 Ill. 218; *Blackman v. Lehman*, 63 Ala. 547. The statute has changed the law in those states. See *Davis v. First Nat. Bank of Blakeley*, 68 So. Rep. (Ala.) 261.

Transfer otherwise than by indorsement.—It was not intended by this section to prescribe an exclusive mode by which the instrument may be transferred; but merely to prescribe a mode by which the transfer can be made so as to protect the transferee against infirmities in the instrument or defects in the title of the transferor. *Carter v. Butler*, 264 Mo. 306. Hence, where a note is indorsed specially to a bank it may be sued upon by a person to whom it has been assigned by a deed of assignment. *Id.*

§ 31. How indorsement made.—The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

Variant readings.—In Illinois the following is added at the end of the section: "And the addition of words of assignment or of guaranty shall not negative the additional effect of the signature as an indorsement unless otherwise expressly stated."

Rule at common law.—The rule as commonly stated was that where there is not room on the bill, the indorsement may be on an allonge. But it is not necessary that there should be a physical impossibility of writing the indorsement on the instrument itself; it may be on an allonge, whenever the necessity or convenience of the parties requires it. See *Folger v. Chase*, 18 Pick. 63; *Crosby v.*

Roub, 16 Wis. 616; French v. Turner, 15 Ind. 50. Besides, any such statement of the rule would give rise to a question of fact which might be determined variously. But see Bishop v. Chase, 156 Mo. 158; Franklin v. Twogood, 18 Iowa, 515; Peach v. Bligh, 37 Ill. 317; Haskell v. Brown, 65 Ill. 29; Wall v. Hollenbeck, 19 Neb. 639. For a case applying the statute, see First Nat. Bank v. Bickel, 143 Ky. 757.

Signature without more—Assignment.—The signature of the indorser without more is the customary and mercantile form of indorsement. But an indorsement of a promissory note as follows: "For value received, I hereby assign, transfer and set over to B all my right, title, interest and claim in the within note," has been held to pass a legal title to the same, and not to destroy its negotiability. Hall v. Toby, 110 Pa. St. 318, see also Thorp v. Minde-man, 123 Wis. 149. So, where the transfer was in the following form: "I Hear By assine this note over to E. H. Farnsworth, this the Nov. 1st, 1910." Farnsworth v. Burdick, 94 Kans. 749. But see Craig v. Palo Alto Stock Farm, 16 Idaho, 701. The words "for value received I hereby guarantee payment of the within note and waive demand and notice of protest on same when due" written on the back of a note by the payee, do not constitute an indorsement and transfer in due course, but constitute a mere guaranty of payment. Ireland v. Floyd, 42 Okla. 609.

Endorsement by stamp.—The name of the drawee stamped on the back of a draft with a rubber stamp, by one having authority to do so, and with intent to indorse it, is a valid indorsement, but does not prove itself. Mayers v. McRimmon, 140 N. C. 640. And the transferee, having possession under such an indorsement, is deemed *prima facie* a holder in due course. Evans v. Freeman, 142 N. C. 61.

Burden of proof as to signature.—Under the statute, as at common law, the holder has the burden of proving the genuineness of each indorsement necessary to his title. Hathaway v. County of Delaware, 185 N. Y. 374; Marks v. Munson, 149 Pac. Rep. (Colo.) 440. But in some states the possession of the instrument is, by other statutes, made presumptive evidence of the genuineness of the signatures thereon. See, for example, Murphy v. Skinner's Estate, 160 Wis. 554.

§ 32. Indorsement must be of entire instrument.—The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorseees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

Transfer of part interest.—For example, where a note for \$500 was indorsed, "Pay to L four hundred dollars out of this note," it was held L could not recover from the maker. *Lindsay v. Price*, 33 Tex. 282. Where the plaintiff alleged in his complaint that the payee had indorsed to the plaintiff a one-half interest in the note, it was held that the complaint failed to state a cause of action at law. *Barkley v. Muller*, 164 App. Div. (N. Y.) 35.

Partial payment.—The indorsement of a partial payment on the instrument does not render it non-negotiable. *Smith v. Shippey*, 182 Pa. St. 24.

§ 33. Kinds of indorsement.—An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

§ 34. Special indorsement—indorsement in blank.—A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

Variant readings.—In Wyoming the word "made" is inserted between the words "be" and "payable." In Massachusetts the words "does not specify any indorsee" are substituted for the words "specifies no indorsee."

Parol evidence.—The legal effect of an indorsement in blank may not be varied by parol. *Torbert v. Montague*, 38 Colo. 325.

§ 35. Converting blank indorsement into special indorsement.—The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

Rule at common law.—The section makes no change in the law. See *Beckwith v. Angell*, 6 Conn. 317.

Special indorsement—Guaranty.—Thus, he might write over the blank indorsement a special indorsement to himself, or to some other person. But he could not write over it a contract of guaranty; for the effect of this would be to deprive the indorser of his right to notice in case of non-payment. *Belden v. Hann*, 61 Iowa, 42. Such a contract would be inconsistent with the character of the indorsement.

§ 36. When indorsement restrictive.—An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

Variant readings.—In Montana the word “future” is substituted for “further” in subdivision one. This is doubtless an error in engrossing, and not an intentional change.

Restriction upon further negotiation.—“Pay Bank of A only” would be such an indorsement as is meant in subdivision one of this section.

Indorsement for collection.—The most frequent instance of this is the indorsement “for collection.” Such indorsement does not

transfer the title to the indorsee, but constitutes him merely an agent to present the paper, and receive payment thereof for the account of the owner. *Commercial National Bank v. Armstrong*, 148 U. S. 50; *National Butchers' and Drovers' Bank v. Hubbell*, 117 N. Y. 384; *Armstrong v. National Bank of Boyertown*, 90 Ky. 431; *Freeman's Bank v. National Tube Works*, 151 Mass. 413; *Sweeney v. Easter*, 1 Wall. 173; *Commercial National Bank v. Hamilton National Bank*, 42 Fed. Rep. 880; *City Bank of Sherman v. Weiss*, 68 Tex. 332; *Central R. R. Co. v. First National Bank of Lynchburg*, 73 Ga. 384; *Bank of Metropolis v. First National Bank of Jersey City*, 19 Fed. Rep. 658; *Blaine v. Bourne*, 11 R. I. 119; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Northwestern National Bank v. Bank of Commerce*, 107 Mo. 402; *Murchison Nat. Bank v. Dunn Oil Mills*, 150 N. C. 718. Where an indorsement in blank is accompanied by a letter stating that the draft is for "collection and credit," the indorsement and letter must be read together, and the effect is to make the indorsement restrictive, and the same in character as if the contents of the letter had been incorporated in the indorsement. *Bank of America v. Waydell*, 187 N. Y. 115. As to the liability of an indorser to whom the instrument has been indorsed "for collection," see note to section 66.

Title in trust.—See *Lloyd v. Sigourney*, 5 Bing. 252, 3 M. & P. 229; *Sneel v. Prescott*, 1 Atk. 245. Illustration: Pay A for account of B. In such case the title passes to A; but the indorsement is restrictive to the extent that it gives notice that the instrument cannot be negotiated by A for his own debt, or for his own benefit. *Hook v. Pratt*, 78 N. Y. 371, 375.

Omission of words "to order" in indorsement.—Thus, if the instrument is drawn to the order of A, his indorsement "Pay to B" does not restrict the further negotiation of the instrument, though the words "or order" are not included in the indorsement. See *Leavitt v. Putnam*, 3 N. Y. 494.

§ 37. Effect of restrictive indorsement—rights of indorsee.—A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorseees acquire only the title of the first indorsee under the restrictive indorsement.

Variant readings.—In Illinois the following changes are made: At the end of subdivision two, the following is added: "Except in the case of a restrictive indorsement specified in section 36, sub-section 2, any action against the indorser or any prior party that a special indorsee would be entitled to bring." In subdivision three the word "instrument" is substituted for the words "his rights as such indorsee;" and at the end of the section the following is added: "specified in section 36, sub-section 1, and as against the principal or cestui que trust only the title of the first indorsee under the restrictive indorsements specified in section 36 and sub-sections 2 and 3 respectively."

Action by indorsee.—Statute applied in *Smith v. Bayer*, 46 Ore. 143; *Schmidt v. Pegg*, 172 Mich. 160; *Craig v. Palo Alto Stock Farm*, 16 Idaho, 701. See also *Gleason v. Thayer*, 87 Conn. 248.

Payer indorsed for collection.—The statute enables a bank to sue in its own name on paper indorsed to it "for collection." *Metzger v. Sigall*, 83 Wash. 80. As to whether this could be done before the statute there was some conflict in the authorities. The right is sustained by *Wilson v. Tolson*, 79 Ga. 137; *Cummings v. Kohn*, 12 Mo. App. 585; *Wintermute v. Torrent*, 83 Mich. 555; *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11; *Spofford v. Norton*, 126 Mass. 333; *Whiten v. Hayden*, 9 Allen, 408; *Roberts v. Parrish*, 17 Oregon, 583; *McDaniel v. Pressler*, 3 Wash. 636; *Ward v. Tyler*, 52 Pa. St. 393. But in *Rock County National Bank v. Hollister*, 21 Minn. 385, it was held that the provisions of the Code requiring the action to be brought in the name of the real party in interest would prevent an indorsee to whom the instrument was indorsed "for collection" from maintaining the action.

Equities of prior parties.—The restrictive indorsee takes the paper subject to all equities that might have been asserted by the principal obligor had it not been indorsed. *Smith v. Bayer*, 46 Oregon, 143.

§ 38. Qualified indorsement.—A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

How qualified indorsement made.—See *Grant v. Fleming*, 46 Pa. St. 140; *Cowles v. Harts*, 3 Conn. 522. But the words employed must clearly indicate that the indorser intends to disclaim liability. *Fassin v. Hubbard*, 55 N. Y. 470. Hence, where the payee wrote above his signature an assignment in the following form, "I hereby assign the within note to ———," *Held*, that this did not relieve him from liability as indorser. *Markey v. Casey*, 108 Mich. 184. An indorsement "without recourse and without warranty of any character," is a qualified indorsement within the meaning of this section. *Schmidt v. Pegg*, 172 Mich. 160.

Parol evidence.—The words "without recourse" following the name of the first, and preceding the name of a second, indorser may, as between them, be shown by parol evidence to apply to the former instead of to the latter. *Corbett v. Fetzner*, 47 Neb. 269; *Goolrick v. Wallace*, 154 Ky. 596. And this although the second indorsee took it without knowing that the limitation was applicable to the first indorser. *Fitchburg Bank v. Greenwood*, 2 Allen, 434.

Effect as to negotiability.—A qualified indorsement in no respects affects the negotiability of the instrument, but simply qualifies the duties, obligations and responsibilities of the indorser resulting from the general principles of the law. *Stewart v. Preston*, 1 Fla. 10, 22. And whatever interest would pass by a general or full indorsement will pass by a qualified indorsement. *Stewart v. Preston*, 1 Fla. 10, 22; *Epler v. Funk*, 8 Pa. St. 468. The provision of this section, that a restrictive indorsement does not impair the negotiable character of the instrument, applied in *Elgin City Banking Co. v. Hall*, 119 Tenn. 548; *Leavitt v. Thurston*, 38 Utah, 351; *Page v. Ford*, 65 Oregon, 450; *Bank of Sampson v. Hatcher*, 151 N. C. 359.


Indorsement in blank.—If the indorsement is in blank, without recourse, any subsequent holder is authorized to fill up the blank with his own name as indorsee. *Lyon v. Ewings*, 17 Wis. 61.

Equities of prior parties.—A qualified indorsement is not such a departure from the usual course of business as to put the transferee on inquiry as to the equities between the original parties. *Bisbing v. Graham*, 14 Pa. St. 14; *Lomax v. Picot*, 2 Rand, 260. And this is so, though the words without recourse are added to an indorsement in the following form: "For value received I hereby sell, transfer and assign the within note." *Thorp v. Mindeman*, 123 Wis. 140 (a case arising under the statute). See note to section 56.

§ 39. Conditional indorsement.—Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

Rule at common law.—The first sentence is the same as section 33 of the English Bills of Exchange Act with a slight modification. In his note to that section Judge Chalmers says: "This section alters the law. It was formerly held that if a bill was indorsed conditionally, the acceptor paid it at his peril if the condition was not fulfilled. This was hard on him. If he dishonored the bill he might be liable to damages, and yet it might be impossible for him to find out if the conditions had been fulfilled." See *Daniel on Neg. Inst.*, sections 697, 698a. There appear to be no American cases upon the subject; and the only English case is *Robertson v. Kensington*, 4 Taunt. 30.

Title to paper or proceeds.—The rule adopted in the last sentence of this section is somewhat analogous to that which gives to an indorser who has paid a note in part an equitable right *pro tanto* in the proceeds, where the holder afterward collects the whole amount of the note from the maker. See *Madison Square Bank v. Pierce*, 137 N. Y. 444.



§ 40. Indorsement of instrument payable to bearer.

—Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

Variant readings.—In Illinois the section reads: “Where an instrument originally payable to and indorsed specially to bearer is subsequently indorsed specially, it may,” etc. But there seems to be some confusion here; for by the express provision of section 34, a “special” indorsement “specifies the person to whom, or to whose order the instrument is payable,” and under the act, as under the Law Merchant, there can be no such thing as an instrument “indorsed specially to bearer.”

Rule of the law merchant.—This section makes no change in the law. See *Johnson v. Mitchell*, 50 Tex. 212; *Smith v. Clarke*, Peake, 225; *Mitchell v. Fuller*, 15 Pa. St. 268; *Daniel on Neg. Inst.*, sections 663a, 696.

Instrument payable to specified person or bearer.—A check payable to a certain named person, or bearer, need not be indorsed, nor need the holder thereof be identified; and a bank paying such check without identification of the holder is not negligent, though the bank, in compliance with its custom, required it to be indorsed. *Farmers & Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64.

Reason for the rule.—The rule adopted in this section may be inconvenient in practice at times, as, for example, when paper drawn payable to bearer is sent through the mail. But to permit the holder to make the instrument payable to a specified person, or to his order, would be to allow him to vary the contract of the acceptor or maker. Thus, if A makes his note payable to B or bearer, he does not assume the obligation of seeing that the instrument is properly indorsed; and upon no rational legal theory should it be in the power of the holder to impose upon him a duty which, by the express terms of his contract, he refused to take upon himself.

Where paper is indorsed in blank.—The section cannot apply where the paper is originally made payable to order and indorsed

in blank; for by section 9 a note or bill which, upon its face, is payable to order, becomes payable to bearer only when the *last* indorsement is in blank; and hence, when a blank indorsement is followed by a special indorsement the instrument is not within the terms of section 9. Thus, if a check drawn to the order of A is indorsed in blank by the payee, and delivered to B, and B indorses it to the order of C, it is not payable to bearer, for the reason that the *last* indorsement, which by section 9 is made the test, is a special indorsement. The reason for making a distinction in this respect between instruments originally drawn payable to bearer and instruments which have become so payable because indorsed in blank is obvious. In the one case, the maker or drawer has expressly provided that the instrument shall be payable to bearer, and it cannot be made payable to order without modifying these terms. But where, upon its face, it is payable to order, a transferee, taking under a blank indorsement, does not, by indorsing it specially, change its tenor as originally drawn.

§ 41. Indorsement where payable to two or more persons.—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

Variant readings.—In Wisconsin the word “joint” is interpolated after the word “or” and before the word “indorsees.”

Rule at common law.—This section makes no change in the law. The settled rule of the law merchant was that co-payees, not partners, must each indorse, in order to negotiate the paper. *Willis v. Green*, 5 Hill. 233; *Foster v. Hill*, 36 N. H. 526; *Bennett v. McGaughy*, 4 Miss. 192; *Wood v. Wood*, 16 N. J. L. 428; *Smith v. Whiting*, 9 Mass. 334; *Ryhiner v. Feickert*, 92 Ill. 305; *Allen v. Corn Exchange Bank*, 87 App. Div. (N. Y.) 335. For cases arising under the statute, see *First Nat. Bank v. Gridley*, 112 App. Div. (N. Y.) 398; *Martz v. State Nat. Bank*, 147 App. Div. (N. Y.) 250.

§ 42. Instrument payable to cashier — to fiscal officer of corporation.—Where an instrument is drawn or

indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

Variant reading.—In South Dakota the words "the indorsement of " before the words " the bank or corporation " near the end of the section are omitted.

Indorsement to cashier.—It is common practice for banks to indorse in this way paper remitted for collection. The rule adopted in the act, so far as it relates to indorsements to cashiers of banks, was well established. See *Bank of the State v. Muskingum Bank*, 29 N. Y. 619; *First Nat. Bank v. Hall*, 44 N. Y. 395; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312; *Folger v. Chase*, 18 Pick. 63; *Farmers', etc., Bank v. Troy City Bank*, 1 Dough. (Mich.) 457; *Watervliet Bank v. White*, 1 Denio, 608; *Lookout Bank v. Aull*, 93 Tenn. 645. Under this section it is competent in an action on a certificate of deposit made payable to S as cashier of a bank, and indorsed by him as cashier, to show that he was the cashier of such bank, and was acting in that capacity in transferring the certificate. *Johnson v. Buffalo Center State Bank*, 134 Iowa, 731. And it is not competent for the bank, for the purpose of showing that the bank was not bound by this act, to prove that S was making use of his official title and authority in his individual interest. (Id.) The provisions of this section do not apply where the cashier's individual name is used without the title of his office. *First Nat. Bank of Pomeroy v. McCullough*, 50 Oregon, 508. And the mere possession by a bank of notes payable to its cashier in his individual name does not enable it to maintain an action thereon against the maker. *Swanby v. Northern State Bank*, 150 Wis. 572. For cases applying the statute, see *Griffin v. Erskine*, 131 Iowa, 444, 450-451; *Craig v. Palo Alto Stock Farm*, 16 Idaho, 701.

Fiscal officers of other corporations.—The commissioners deemed it wise to extend the rule to all fiscal officers of corporations. Under this provision an indorsement to the treasurer of a savings bank would make the paper payable to the bank. So of an in-

dorsement to the treasurer or secretary of a trust company. A check payable to the order of "Treas. of Town of Farmingham" is in legal effect payable to the town. *Quincy Mut. Fire Ins. Co. v. International Trust Co.*, 217 Mass. 370.

§ 43. Mistake in name of payee — form of indorsement.—Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

Name assumed in business.—Thus, one who, while carrying on business on his own account in the name of a company which has been incorporated, but not organized, receives in payment of a debt contracted with him in such business a promissory note payable to the order of the corporation, may transfer the note by indorsing it in his own name. *Bryant v. Eastman*, 7 Cush. 111. Conversely, a man will be bound by paper made by him in the name he adopts in his business. *Salmon v. Hopkins*, 61 Conn. 47.

§ 44. Indorsement in representative capacity.—Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

When personal liability negatived.—For a case applying the statute, see *Chelsea Exchange Bank v. First U. P. Church*, 89 Misc. (N. Y.) 616. In this case persons who indorsed as the financial committee of a church were held not to be bound personally.

Indorsement by personal representatives.—As to the liability of executors and administrators who accept or indorse, see *Schmittler v. Simon*, 101 N. Y. 554.

§ 45. Presumption as to time of.—Except where an indorsement bears date after the maturity of the instrument every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

Rule at common law—Burden of proof.—The rule adopted in this section prevailed at common law. See *Mason v. Noonan*, 7 Wis. 609. If the defendant alleges that the paper was indorsed after it was due, the burden of proof is on him to show it. *White v. Camp*, 1 Fla. 94. This rule is important because that, in order to constitute one a holder in due course, he must have taken the instrument before it was overdue. See section 52. The indorsement of an overdue note cannot relate back to the date of the note; as a new and independent contract, it takes effect from the time it is made, and must be determined by the laws then in force and the circumstances then existing. *Brown v. Hull*, 33 Gratt. 23, 30. For a case applying the statute, see *Cedar Rapids Nat. Bank v. Bashara*, 39 Okla. 482.

§ 46. Presumption as to place of.—Except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

Importance of presumption—Illustrations.—As an indorsement is not merely a transfer of the instrument, but is a new and substantive contract embodying in itself all the terms of the instrument, the place where it was made often becomes of importance. See *Ingalls v. Lee*, 9 Barb. 647; *Brown v. Hull*, 33 Gratt. 27, 29; *Smith v. Caro*, 9 Oregon 278; *Bank of British N. Am. v. Ellis*, 6 Sawyer, 98; *Freese v. Brownell*, 35 N. J. Law, 285. For example, an indorsement in Massachusetts of a note executed and payable in New York is a Massachusetts contract and governed by the law of that state. *Glidden v. Chamberlin*, 167 Mass. 486. An indorsement in blank of a promissory note dated and payable in the State of New York is presumed, both at common law and under the statute, to have been made here, and one discounting the note in good faith is entitled to rely upon that presumption. *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92. Where a married woman, at her residence in New Jersey, indorsed in blank, for her husband's benefit, his promissory note, dated and payable in New York, where it was discounted in good faith, without notice that the indorser was a non-resident, or that the indorsement was made in another state: *Held*, that she was estopped to deny that her indorsement was a New York contract, and from claiming that it was a New Jersey contract. (*Id.*)

Place where note made.—In the absence of evidence to the contrary a note is presumed to have been made at the place where it bears date. *Finch v. Calkins*, 183 Mich. 298.

§ 47. Continuation of negotiable character.—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

Rule at common law.—This section does not change the law. See *Cumberland Bank v. Hann*, 3 Harr. (N. J.) 222. The law was perfectly well settled that a note or bill negotiable in form is negotiable as well after as before it becomes due. *National Bank of Washington v. Texas*, 20 Wall. 72; *McSherry v. Brooks*, 46 Md. 103, 118; *French v. Jarvis*, 29 Conn. 347; *Adair v. Lenox*, 15 Oregon, 489.

Rights and liabilities of the parties.—But the rights, duties and obligations of the parties are by no means the same. The instrument becomes, according to legal effect, payable on demand, so far as the indorser is concerned; and presentment for payment must be made within a reasonable time, and due notice of dishonor given to the indorser. *Brown v. Hull*, 33 Gratt. 23, 28; *Berry v. Robinson*, 9 Johns. 121; *Van Hoosen v. Van Alstyne*, 3 Wend. 79; *Poole v. Tolleson*, 1 McCord, 200; *Patterson v. Todd*, 18 Pa. St. 426; *Rosson v. Carroll*, 90 Tenn. 90. But if the paper was presented at maturity and notice of dishonor given to prior parties, it is not necessary that the indorsee after maturity should again present the paper and give them notice of dishonor; for the original demand and notice were to the benefit of all subsequent holders. *French v. Jarvis*, 29 Conn. 347. As to the discharge of negotiable instruments, see sections 119-125.

§ 48. Striking out indorsement.—The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

Variant reading.—In Kentucky the word “owner” is substituted for “holder.” If this is not merely an error in engrossing, the reason for the change would be difficult to understand. For while “holder” has a clear and well-defined meaning, when used with respect to commercial paper, the word “owner,” when so used, is one of those inexact terms which cause confusion.

Rule at common law.—This section is declaratory of the law as it existed prior to the enactment of the statute. *Jerman v. Edwards*, 29 App. Cases D. C. 535.

Where paper has been indorsed in blank.—The holder may strike out all intervening indorsements, and aver that the first blank indorser indorsed immediately to himself. *New Haven Mfg. Co. v. New Haven Pulp & Board Co.*, 76 Conn. 126, 131-132; *Byles on Bills*, 149; *Preston v. Mann*, 25 Conn. 127; *Bank of America v. Senior*, 11 R. I. 376.

Striking out indorsements at trial.—Intervening indorsements may be struck out at the trial, and after the plaintiff has finished his case. *Ensign v. Fogg*, 177 Mich. 317; *Mayer v. Jadis*, 1 M. & Rob. 247. See also *Morris v. Cude*, 57 Tex. 337; *Rand v. Dovey*, 83 Pa. St. 281; *Merz v. Kaiser*, 20 La. Ann. 379; *Vanarsdale v. Hax*, 107 Fed. Rep. 878. And it is immaterial that an intermediate indorsement is restrictive. *Jerman v. Edwards*, 29 App. Cases D. C. 535.

Presumption of ownership.—The erasure of intermediate indorsements does not destroy the presumption that the person in possession of paper indorsed in blank is the holder thereof. *King v. Bellamy*, 82 Kans. 301.

§ 49. Transfer without indorsement—Effect of.—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

Variant readings.—In Alabama the word “holder” and “said holder” are substituted for transferrer. But the use of “holder” in this connection is confusing; for by section 191 “holder” is defined to mean the payee or indorsee who is in possession of the instrument, and where the transfer is without indorsement neither the transferrer nor the transferee answers to this description. Nor is the matter helped by the use of the archaic form “said.” In Colorado the words “if omitted by mistake, accident or fraud” are added at the end of the first sentence. In Illinois and Missouri, the words “to have the indorsement of the transferrer” are struck out, and the following substituted therefor: “to enforce the instrument against one who signed for the accommodation of the transferer, and the right to have the indorsement of the transferer if omitted by accident or mistake.” If this is to be taken literally, the right of the transferee to enforce the instrument against a prior party is limited to cases where such prior party has signed for the accommodation of the transferer. The reason for the change does not seem to be very clear. In Wisconsin the following is added at the end of the section: “When the indorsement was omitted by mistake, or there was an agreement to endorse made at the time of the transfer, the endorsement when made relates back to the time of transfer.”

Effect of transfer without indorsement.—Under this section a negotiable instrument, payable to the order of a person named, may be effectually transferred by mere delivery, and the assignee takes the legal title, and may sue in his own name; but he takes subject to the defenses in favor of prior parties. *Martz v. State Nat. Bank*, 147 App. Div. (N. Y.) 250; *Meuer v. Phoenix Nat. Bank*, 42 Misc. (N. Y.) 341; *Bank of Bromfield v. McKinley*, 53 Colo. 279; *Callahan v. Louisville Dry Goods Co.*, 140 Ky. 712; *Forter’s Admr. v. Metcalf*, 144 Ky. 385; *First Nat. Bank v. Stam*, 186 Mo. App. 439; *Sublette v. Brewington*, 139 Mo. App. 410; *Carter v. Butler*, 264 Mo. 306; *Keifer v. Talbert*, 128 Minn. 519; *Steinhilper v. Basnight*, 153 N. C. 293; *First Nat. Bank of Pomeroy v. McCullough*, 50 Oregon 508; *Landis v. White*, 127 Tenn. 504; *Ireland v. Scharpenberg*, 54 Wash. 558; *Smith v. Nelson*, 212 Fed. Rep. 56. But under the statute, as well as under the law merchant, the indorsement is required to constitute the transferee a holder in due course. *Mayers v. McRimmon*, 140 N. C. 640, 642-643. Thus, the purchaser of a certified check, payable to order,

who obtains title without the indorsement of the payee, holds it subject to all equities between the original parties, although he paid full consideration, without notice. *Goshen National Bank v. Bingham*, 118 N. Y. 349; *Jenkinson v. Wilkinson*, 110 N. C. 532. And an intention on the part of the payee and transferee to have the paper indorsed is not sufficient, at least in the absence of an express agreement to indorse. It is the act of indorsement, not the intention, which negotiates the instrument. *Goshen National Bank v. Bingham*, *supra*. Where a check, drawn to the order and in the hands of a *bona fide* holder for value, has at his request been certified by a bank, and is a valid obligation against the maker, and there are no equities between him and the bank, the holder can recover of the bank upon the check, although the maker had not indorsed it to him. *Meuer v. Phoenix National Bank*, 42 Misc. (N. Y.) 341.

Paper sold under execution.—Where a note has been attached and sold under execution, the purchaser may sue thereon without regard to whether the sheriff's indorsement to him was regular or irregular. *Fishburn v. Lauderslausen*, 50 Ore. 364.

Presumption of ownership.—In *Callahan v. Louisville Dry Goods Co.*, 140 Ky. 714, it was said that, under the statute, no indorsement is necessary to invest the holder with the presumption of ownership, but possession alone presupposes ownership in due course. See also *Roy v. Duff*, 152 N. W. Rep. (Iowa) 606. But this appears to be a misapprehension of the effect of the section. The rule that possession is *prima facie* proof of ownership applies only where the paper is drawn payable to bearer, or has become so payable because indorsed in blank; but where it is payable to order, proof of the indorsement of the payee, or of the indorsee to whom it has been indorsed specially, has always been required (*Hathaway v. County of Delaware*, 185 N. Y. 368); and certainly there is nothing in section 49 to change this rule of evidence. If the holder claims title under this section, then, instead of proving the indorsement of the payee as a part of his case, as he would ordinarily do, he should prove the special circumstances which bring the case within the section.

Relation back.—An indorsement after notice of a defense does not relate back to the transfer, so as to cut off intervening rights and remedies. *Meuer v. Phenix Nat. Bank*, 42 Misc. (N. Y.)

341. But it has been held that the holder is protected against everything subsequent to delivery, the indorsement being deemed to relate back to the time of delivery as to any equity outside of the note itself. *Beard v. Dedolph*, 29 Wis. 136.

§ 50. When prior party may negotiate instrument.
—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

See note to section 121.

ARTICLE V.

RIGHTS OF HOLDER.

- Section 51.** Right of holder to sue—payment.
52. What constitutes a holder in due course.
53. Instrument payable on demand—negotiation of—unreasonable time.
54. Notice before full amount paid.
55. When title defective.
56. What constitutes notice of defect.
57. Rights of holder in due course.
58. When subject to original defenses.
59. Presumption—Burden of proof.

§ 51. Right of holder to sue—Payment.—The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

Pleading.—A complaint in an action upon a promissory note which in substance alleges that on or about a certain date the defendant made his promissory note, whereby he promised to pay to the order of the plaintiff a certain sum of money, on a certain date, with interest, but that no part thereof has been paid, states a cause of action. *First National Bank v. Stallo*, 160 App. Div. (N. Y.) 702.

Evidence of title.—Where the plaintiff is the payee, the production of the paper is sufficient. *Tullis v. McClary*, 128 Iowa, 493; *Williams v. Holt*, 170 Mass. 351. And where the instrument is payable to bearer, or, if payable to order, is indorsed in blank, possession is sufficient evidence of title on which to maintain the action. *Newcombe v. Fox*, 1 App. Div. 389; *Weber v. Orton*, 91 Mo. 680. The court will never inquire whether he sues for himself or as trustee for another, nor into the right of possession, unless on an allegation of *mala fides*. *Ellicott v. Martin*, 6 Md. 509.

And the *prima facie* case made in favor of the plaintiff by his possession of the instrument can not, in the absence of *mala fides*, be rebutted by evidence that the title was in some other party. (Id.) See also *Lowell v. Bickford*, 201 Mass. 543. As a general rule, possession by the attorney for a party is possession by the party himself. *Kunkel v. Spooner*, 9 Md. 462. But, of course, the indorsement must be proved; for the mere possession by another than the payee, of an unindorsed negotiable note or bill not payable to bearer, is not *prima facie* evidence of ownership. *Hathaway v. County of Delaware*, 185 N. Y. 374; *Shepard v. Hanson*, 9 N. D. 249; *Tyson v. Jayner*, 139 N. C. 69. But see *Callahan v. Louisville Dry Goods Company*, 140 Ky. 712. In the case last cited the court said: "Reading these four sections together, it is evident that the holder of a note is deemed to be the holder in due course, that is, to have come lawfully into possession of it, and he may maintain an action on it in his own name. No indorsement is necessary to invest the holder with the presumption of ownership, but possession alone presupposes ownership in due course, and this presumption is indulged until overcome by proof supported by proper plea." See also *Roy v. Duff*, 152 N. W. Rep. (Iowa) 606. But see note to section 49.

Payments.—The instrument can be satisfied only by payment to the owner at the time or to such owner's authorized agent. If the recipient of the money is not actually authorized the payment is ineffectual, unless induced by unambiguous direction from the owner or justified by actual possession of the note. *Marling v. Mommensen*, 127 Wis. 363. The maker of a note, in order to avail himself of the defense of payment before maturity, must show that the indorsee had prior notice of the payment. *Yenney v. Central City Bank*, 44 Neb. 402. But where the instrument is indorsed "for collection," the payment to the indorser after the transfer is a good defense, even against a claim of prior beneficial ownership by the indorsee. *Smith v. Bayer*, 46 Ore. 143.

§ 52. What constitutes a holder in due course.—A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was

overdue, and without notice that it had been previously dishonored, if such was the fact;

3. That he took it in good faith and for value;

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Variant reading.—In Wisconsin the following is added at the end of the section: "5. That he took it in the usual course of business." This phrase, though often used by judges and lawyers, was always obscure, and for that reason, its omission from the statute by the draftsman was approved by all the Commissioners on Uniform Laws.

Incomplete or irregular instrument.—Under this section, a bank discounting notes blank as to date, amount and maturity, is not a holder in due course. *Hunter v. Allen*, 127 App. Div. (N. Y.) 572. Where a note recited that it was payable in "Four———" *Held*, that the holder of the note was not a "holder in due course" for it was not complete and regular on its face. *In re Philpott's Estate*, 151 N. W. Rep. (Iowa) 825. See also *Bank of Houston v. Day*, 145 Mo. App. 410. So, where it was plainly apparent that the date had been changed. *Elias v. Whitney*, 50 Misc. (N. Y.) 326. But where a note was partly printed and partly written, and the words "payable with interest" were in the same handwriting as the other written portions of the note, except the maker's name, and were not interlined, but written on a blank space after the words "Value received," it was held that the note was to be regarded as complete and regular on its face. *American Bank v. McComb*, 105 Va. 473. To determine the character of an indorsee as a *bona fide* holder for value without notice, the point of time at which he parts with his money is the important fact. If the paper was then on its face irregular—out of the usual course of business—the effect of that knowledge on the indorsee could not be prevented by subsequently putting it in a regular shape. *Losee v. Bissell*, 76 Pa. St. 459, 462. As to incomplete instruments, and the authority to fill up blanks therein, see section 14.

Post-dated instruments.—The fact that the instrument is post-dated affords no cause of suspicion so as to put the transferee on inquiry. *Brewster v. McCardel*, 8 Wend. 478.

Payee as holder in due course.—At common law the payee may be a holder in due course. See *Watson v. Russell*, 3 B. & S. 34; 5 B. & S. 968; *Nelson v. Cowing*, 6 Hill, 333, 339. Thus, the holder of a draft drawn by a bank on its correspondent may be deemed a holder in due course, though he is named therein as payee. *Armstrong v. American Exchange National Bank*, 133 U. S. 433. Whether the statute has changed this rule, the courts are not agreed. In New York, Massachusetts and Alabama it has been held that there is nothing in the statute which precludes the payee from being such a holder. *Brown v. Brown*, 91 Misc. (N. Y.) 220; *Liberty Trust Co. v. Tilton*, 217 Mass. 462; *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140; *Ex parte Goldberg*, 67 So. Rep. (Ala.) 839, 843. See also *Wilbour v. Hawkins*, 94 Atl. (R. I.) 856. But in Iowa and Missouri the courts have held that the delivery of the paper to the payee is not a "negotiation" thereof, and hence not within the terms of this section. *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350; *Long v. Shafer*, 185 Mo. App. 641, 648; *St. Charles Sav. Bank v. Edwards*, 243 Mo. 553. See note to section 14.

Overdue paper.—Where commercial paper is acquired after it is overdue, it becomes under this section, and section 58, subject to the same defenses as if it were non-negotiable. *Jacobus v. Jamestown Mantel Co.*, 149 App. Div. (N. Y.) 356; *Austen v. First Nat. Bank*, 150 Ky. 113; *Fairfield Nat. Bank v. Hammer*, 95 Atl. Rep. (Conn.) 31. And this was the rule at common law. *McKim v. King*, 58 Md. 502; *Marsh v. Marshall*, 53 Pa. St. 396; *Davis v. Miller*, 14 Gratt. 1; *Cottrell v. Watkins*, 89 Va. 801. At one time it was doubted whether the mere fact that a negotiable note was overdue at the time of the transfer was in itself sufficient to affect the title of the holder, and whether it was not necessary that there should be something on the face of the paper besides the day of payment to show that it had been actually dishonored. This doubt was expressed by Lord Kenyon in *Brown v. Davies*, 3 T. R. 80, decided in 1789; but *Ashurst and Buller, J.*, were of opinion that the mere fact of its being overdue at the time of the transfer was sufficient to affect the title, and that one taking a note under such circumstances takes it upon the credit of the transferor. Subsequently in *Boehm v. Sterling*, 7 T. R. 423-430, Lord Kenyon gave his assent to the rule thus laid down, and it has never since been questioned. But see *Trego v. Cunningham's Estate*, 267 Ill. 448.

Where interest is overdue.—A promissory note matures when, by its terms, the principal becomes due; and one who purchases it in good faith, for value, before maturity, is within the protection of the law merchant, although interest is overdue at the time of such purchase. *Kelley v. Whitney*, 45 Wis. 110. But the fact that interest is due and unpaid is a material circumstance bearing on the question of whether the purchaser acquired the note in good faith and without notice of prior equities or infirmities in the title. *McPherrin v. Little*, 36 Oklahoma, 510. See also *Hart v. Stickney*, 41 Wis. 630; *Newell v. Gregg*, 51 Barb. 253.

Where installment overdue.—A note payable by installments is overdue when the first installment is overdue and unpaid, and one who takes it afterward takes it subject to all equities between the original parties. *Vinton v. King*, 4 Allen, 562.

When paper deemed overdue.—A transfer upon the day of maturity is before the instrument is overdue; for the principal debtor has the whole of that day in which to pay. *Continental Nat. Bank v. Townsend*, 87 N. Y. 8. But see *Sargent v. Southgate*, 5 Pick. 312; *Ayer v. Hutchins*, 4 Mass. 370; *Pine v. Smith*, 11 Gray, 38. A check deposited with a bank on the day of its date can not be considered as overdue when so deposited. *Shawmut National Bank v. Manson*, 168 Mass. 425. A check dated in a suburb of New York city, June 1, 1900, was sent in the course of business to the state of Kansas, where it arrived on June 8, 1900, and was purchased by a Kansas bank in good faith and for value.—*Held* that the check was not overdue to such an extent as to put the bank upon inquiry or raise any presumption that it knew of any defense existing between the original parties. *Citizens' State Bank v. Cowles*, 89 App. Div. (N. Y.) 281, reversed on other grounds in 180 N. Y. 340.

Payment of value—Discount by bank.—Under this section, it is not sufficient to constitute a bank a holder in due course that it has discounted the paper and placed the proceeds to the credit of its customer. *Albany County Bank v. People's Ice Co.*, 92 App. Div. (N. Y.) 47; *Consolidation Nat. Bank v. Kirkland*, 99 Id. 121; *Merchants Bank v. Santa Maria Sugar Co.*, 162 Id. 248; *Milled v. Morton*, 114 Va. 610; *City Deposit Bank v. Green*, 130 Iowa, 384; *McKnight v. Parsons*, 136 Iowa, 390; *Elgin City Banking Co. v.*

Hall, 119 Tenn. 548; *Tatum v. Commercial Bank*, 185 Ala. 294. And merely crediting to a depositor's account the amount of a check drawn upon another bank, where the account continues to be sufficient to pay the check in case it is dishonored, does not make the bank a holder of the check in due course within this section. *Citizens' State Bank v. Cowles*, 180 N. Y. 346. So, where the credit given by the bank is only provisional, *Commercial Nat. Bank v. Citizens' State Bank*, 132 Iowa 706, 708; *Peoples State Bank v. Miller*, 152 N. W. Rep. (Mich.) 257, or the paper is received for collection only. *Bank of America v. Waydell*, 187 N. Y. 115. But where the sum deposited has subsequently been checked out, the bank becomes a holder for value, although the customer by subsequent deposits has maintained a balance in excess of the amount of the note; for in such case the rule obtains that where a payment is made upon general account, with no direction as to its application, the law applies it to the oldest items; that is, the first debits are to be charged against the first credits. *Merchants Bank v. Santa Maria Sugar Co.*, 162 App. Div. (N. Y.) 248, 249. See also *Northfield Nat. Bank v. Arndt*, 132 Wis. 383. And if the bank incurs a liability by reason of the deposit, as where it obligates itself to honor a check, it is a holder for value. *Montrose Savings Bank v. Claussen*, 137 Iowa, 73; *Nat. Bank of Commerce v. Armbruster*, 42 Okl. 656; *Elmore Co. Bank v. Avaunt*, 66 So. Rep. (Ala.) 509. So, if the depositor was indebted to the bank, and the proceeds of the discount are applied to the payment of this indebtedness. *City Deposit Bank v. Green*, 130 Iowa, 384; *Wallabout Bank v. Peyton*, 123 App. Div. (N. Y.) 727; *Mechanics Bank v. Chardavoyne*, 69 N. J. L. 256. Or the bank discounting the paper obtains credit for its customer with another bank for the amount of the proceeds. *Elgin City Banking Co. v. Hall*, 119 Tenn. 548. But where the avails of a discount are applied to an existing indebtedness, the bank must show that there was an agreement that they should be applied in payment and extinguishment thereof. *Consolidation Nat. Bank v. Kirkland*, 99 App. Div. (N. Y.) 121. If a bank purchases a note prior to its maturity, and the seller neglects to draw out the proceeds credited to him, the bank, in the absence of notice, would have the right to pay out such proceeds to the seller even after maturity of the note, and this being done in good faith and without notice of defects, would constitute the bank a holder in due course. *National Bank of Commerce v. Armbruster*, 42 Okla. 656, 661. Where a bank pays for a draft

with bill of lading attached, by giving credit to the checking account of the drawer, its position after acceptance by the drawee is that of a holder in due course, whether or not the drawer had checks against the deposit at the time of the drawee's acceptance. *Tapee v. Varley*, 184 Mo. App. 470.

Bills negotiated before acceptance.—Where one becomes a holder for value of a bill before acceptance he is deemed a holder in due course as against a subsequent acceptor without any new consideration proceeding from him to the drawee. *Nat. Park Bank v. Saitta*, 127 App. Div. (N. Y.) 624; *Mt. Vernon Nat. Bank v. Kelling-Karel Co.*, 189 Ill. App. 375.

Notice before presentment of check given in payment.—Where the purchaser of a negotiable instrument gives his check in payment in good faith he will be deemed a holder in due course, though he learns of some infirmity in the paper before the check is actually paid by the bank. *Miller v. Marks*, 148 Pac. Rep. (Utah) 412.

Paper payable in the alternative.—Where a promissory note payable to the order of A or B is indorsed by A only to one who takes it in good faith for value and without any notice of infirmity in the instrument or defect in the title, the indorsee is a holder in due course under this section. *Voris v. Schoonover*, 91 Kas. 530.

Gift of Instrument.—The gift of a negotiable instrument will not make the donee a holder in due course. *Greer v. Orchard*, 175 Mo. App. 494.

Accommodation Paper.—If one purchases an accommodation note for cash, and sells it to a *bona fide* purchaser in exchange for the purchaser's note, the latter may be a holder in due course within the meaning of the statute. *Mehlinger v. Harriman*, 185 Mass. 245. Where the payee gives a written direction at the foot of the note, "credit the drawer," and the note is afterward discounted by a bank, or found in the possession of any person not a party to the original transaction, the presumption is that the holder is a holder for value, and that the drawer received the proceeds according to the directions so given. *Steckel v. Steckel*, 28 Pa. St. 233, 235. As to what will constitute value, see section 25. *Prima facie* value is presumed. Section 24.

Notice.—As to what is necessary to constitute notice, see section 56.

§ 53. Instrument payable on demand—negotiation at unreasonable time.—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

What is a reasonable time.—Under this section it has been held that a check issued on a certain date, and bearing that date and negotiated at noon of the following day, was not overdue so as to carry to an indorsee notice of its illegality or previous dishonor. *Matlock v. Scheuerman*, 51 Ore. 49. So, of a check drawn on Saturday and negotiated on the following Monday. *Asbury v. Laube*, 151 Ky. 142. So, a cashier's check issued May 18th, and indorsed five days later, was held to have been negotiated within a reasonable time. *Singer Manufacturing Co. v. Summers*, 143 N. C. 102. But a note payable on demand purchased more than a year after its date was held to have been overdue. *McAdam v. Grand Forks Mercantile Co.*, 24 N. D. 645. As to what is reasonable time will depend upon the facts of the particular case. See page 7. No absolute measure can be fixed. A day or two, *Field v. Nickerson*, 13 Mass. 131, 137; seven days, *Thurston v. McKenn*, 6 Mass. 428, and even a month, *Ranger v. Cory*, 1 Metc. 369, is not too long, while eight months, *American Bank v. Jennes*, 2 Metc. 288; *Ayres v. Hutchins*, 4 Mass. 370; *Nevins v. Townsend*, 6 Conn. 7; three months and a half, *Stevens v. Brice*, 21 Pick. 193; and even two months and a half, *Losce v. Durkin*, 7 Johns. 70; *Sice v. Cunningham*, 1 Cowen, 397, 404, have been deemed sufficient to discredit a note. See note to sec. 71.

Coupons—Coupons payable to bearer are, when overdue, subject to equities; they are not in this respect like bank notes. *McKim v. King*, 58 Md. 502.

§ 54. Notice before full amount paid.—Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

Common Law Rule—Reason of.—This section is merely declaratory of the law as it existed before the enactment of the statute. *Albany County Bank v. People's Ice Co.*, 92 App. Div. (N. Y.) 47. The case falls within the general rule that the portion of an unperformed contract which is completed after notice of a fraud is not within the principle which protects a *bona fide* purchaser. *Dreser v. Missouri, etc., R. R. Construction Co.*, 93 U. S. 93.

§ 55. When title defective.—The title of a person who negotiates an instrument is defective within the meaning of this act when he obtains the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

Variant readings.—In Wisconsin the following is added at the end of the section: “and the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care.”

Renewal Notes—Usury.—Under this section the title of a person negotiating a note is defective where the only consideration was usury on a former note between the same parties. *Keene v. Behan*, 40 Wash. 505.

Paper obtained by misrepresentation.—Where brokers employed to purchase stock represented that they had acquired the stock, and received a check, though they had not in fact done so, their title was defective within the meaning of this section. *People's State Bank v. Miller*, 152 N. W. Rep. (Mich.) 527.

Where fraud does not affect party.—The fraud in putting the paper into circulation must be a fraud against the defendant. *Kinney v. Kruse*, 28 Wis. 189. Thus, the fact that one who held possession of a note for the payee put it in circulation in fraud of his rights is no defense in a suit by the holder against the maker. *Id.* And where the fraud consists in the misapplication of the proceeds received for the paper it will not affect the paper in the hands of the holder, as he is not in any manner bound to look to

their application, nor responsible for the misappropriation of them. *Gray's Admr. v. Bank of Kentucky*, 29 Pa. St. 365. There is no distinction between obtaining a note by fraud and fraudulently putting it in circulation. *National Reserve Bank v. Morse*, 163 Mass. 381, 385.

Where only part of signatures are obtained by fraud.—Under this section where a note is made by several persons, and the signatures of some of the makers are obtained by fraud, the paper is voidable by all the others, though they were not themselves deceived; for when several persons assume such an obligation it is material and important that all who join as makers should share equally in bearing the burden of payment, and if, through the fraud of the payee, such equality of burden is disturbed, and the burden increased as to some of the persons signing the paper, such fraud renders the title defective as to all. *Schmidt v. Bank of Commerce*, 234 U. S. 64; *Hodge v. Smith*, 130 Wis. 326; *Aukland v. Arnold*, 131 Wis. 64.

§ 56. What constitutes notice of defect.—To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Rule at common law.—The rule adopted in the statute is that which was established by the great weight of authority. In numerous well-considered cases it was held that the holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who put the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's right cannot be defeated without proof of actual notice of the defect in title, or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have

taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrines, will prevail. *Valley Savings Bank v. Mercer*, 97 Md. 458, 479; *Cheever v. Pittsburgh, Shenango & Lake Erie R. R. Co.*, 150 N. Y. 59, 65; *American Exchange National Bank v. New York Belting, etc., Co.*, 148 N. Y. 705; *Knox v. Eden Musee Am. Co.*, 148 N. Y. 454; *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 202; *Vosburgh v. Diefendorf*, 119 N. Y. 357; *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652; *Murray v. Lardner*, 2 Wall. 110; *Swift v. Smith*, 102 U. S. 442; *Belmont v. Hoge*, 35 N. Y. 65; *Welsh v. Sage*, 47 N. Y. 143; *Nat. Bank of Republic v. Young*, 41 N. J. Eq. 531; *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law. 513; *Credit Company v. Howe Machine Co.*, 54 Conn. 357; *Ladd v. Franklin*, 37 Conn. 64; *Croft's Appeal*, 42 Conn. 154; *Morton v. N. A. & Selma Ry. Co.*, 79 Ala. 590; *Phelan v. Moss*, 67 Pa. St. 59; *Moorehead v. Gilmore*, 77 Pa. St. 118; *Second National Bank v. Morgan*, 165 Pa. St. 199; *Frank v. Lilienfeld*, 33 Gratt. 377.

Application of the section.—For cases applying this section see *Interboro Brewing Co. v. Doyle*, 165 App. Div. (N. Y.) 646; *Coffin v. Tevis*, 164 Id. 314; *Wallabout Bank v. Peyton*, 123 Id. 727; *German-American Bank v. Cunningham*, 97 Id. 244; *Van Slyke v. Rooks*, 181 Mich. 88; *Pratt v. Rounds*, 160 Ky. 358; *Farmers' Bank v. First Nat. Bank*, 164 Ky. 548; *Moutenegro-Riehm Co. v. Illinois Trust Co.*, Id. 608; *Davis v. Clark*, 85 N. J. L. 696; *Arnd v. Aylesworth*, 145 Iowa, 185; *American Nat. Bank v. Lundy*, 21 N. D. 167.

Opportunity for inquiry.—As the transferee is not bound to make inquiry, the fact that the transferrer lives near him is not material. *Seltzer v. Deal*, 135 N. C. 428.

Financial condition of maker.—The fact that the holder may have known of the maker's impecunious circumstances is not enough to put him upon inquiry; for one to whom the paper is offered has a right to rely upon an indorser's responsibility, even though he knows that the maker is in poor circumstances. *Baruch v. Buckley*, 167 App. Div. (N. Y.) 113.

Payment of value.—The payment of value is a circumstance to be taken into account, with other facts, in determining the good faith of the purchaser, but it is not conclusive. *Cunningham v. Scott*, 90 Hun, 410, 411; *Tischler v. Schurman*, 49 Misc. (N. Y.) 257.

Purchasing paper at a discount.—Under this section the mere fact that the holder has taken the paper at a large discount is not sufficient, standing alone, to deprive him of his claim to be a holder in due course. *Ham v. Merritt*, 150 Ky. 11; *Wells v. Duffy*, 69 Wash. 310; *McNamara v. Jose*, 28 Wash. 461. But where the discount is very large, that circumstance may be considered in connection with other facts in determining the question of the purchaser's good faith. *Williams v. Huntington*, 68 Md. 590; *Sabine v. Paine*, 166 App. Div. (N. Y.) 10; *Harris v. Johnson*, 89 Conn. 128.

Rate of interest.—A bank is not chargeable with bad faith because it discounted notes at seven per cent. per annum when the legal rate of interest is but six per cent. *Bank of Monongahela Valley v. Weston*, 172 N. Y. 259.

Purchase of check by bank.—The fact that a bank purchases a check, instead of receiving it on deposit for collection, is not such a deviation from the usual course of business as will justify a conclusion of bad faith on its part. *Citizens State Bank v. Cowles*, 89 App. Div. (N. Y.) 281.

Statement of consideration.—The fact that the nature of the consideration is stated upon the face of the paper is not notice of any defect of title. *Bank of Sampson v. Hatcher*, 151 N. C. 359.

Paper made by corporation.—Where a corporation is authorized to execute notes, a negotiable note executed and issued by it for an *ultra vires* purpose is not void in the hands of an innocent purchaser for value before maturity, even though the purpose for which the note was executed was in violation of the public policy of the state. *Jefferson Bank v. Chapman*, 122 Tenn. 415, 416.

Paper indorsed to corporation.—The provisions of this section apply to all classes of persons, artificial as well as natural. *Cox & Sons Co. v. Northampton Brewing Co.* 245 Pa. St. 418.

Paper of corporation received from officer.—One who receives the notes of a corporation from one of its officers in payment of, or as security for, a personal debt of such officer does so at his peril. *Prima facie* the act is unlawful, and unless actually authorized, the purchaser will be deemed to have taken them with

notice of the rights of the corporation. *Wilson v. Metropolitan Ry. Co.*, 120 N. Y. 145, 150. And where the maker of a note, which is payable to his order, and purports to be indorsed by a corporation, procures it to be discounted for his own benefit, this of itself, if unexplained, is notice that the indorsement is not made in the usual course of business, but is for the accommodation of the maker. *National Park Bank v. German-American Mutual Warehousing and Security Company*, 116 N. Y. 281. But the mere fact that the payee of a promissory note, made by a corporation, is a director of such corporation, is not notice to a transferee of any infirmity in the paper, nor is it sufficient to put him upon inquiry concerning the circumstances under which it was issued; and the rule applicable to notes made by officers of a corporation to their own order and used to pay their individual obligations, has no application to notes made by duly authorized officers payable to a director. *Orr v. South Amboy Terra Cotta Co.*, 113 App. Div. (N. Y.) 103.

Request to delay presentment.—The fact that the payee on transferring a check stated that the drawer had asked that it be held for a few days before presentment does not charge the holder with notice. *Matlock v. Scheuerman*, 51 Ore. 49.

Business reputation of transferor.—The fact that the transferee may know that the person from whom he receives the paper is "crooked" in business matters does not affect his title or make it his duty to inquire about the paper. *Setzer v. Deal*, 135 N. C. 428. In the case last cited, the court said: "It would be almost impossible for the business of banking to be carried on if it was incumbent on bank officers, whenever negotiable paper was offered for discount or sale, to inquire into whether any of the parties to be charged were crooked in their business methods."

Place of contract—Estoppel.—Where a married woman, for her husband's accommodation, indorsed a note dated and payable in New York, it was held that she was estopped from showing, as against a New York bank which had discounted the paper in good faith, that the indorsement had been made in New Jersey, where her contract was void. *Chemical Nat. Bank v. Kellogg*, 183 N. Y. 92, 96.

Conflicting instructions.—For a case where a judgment was reversed because the trial judge coupled with the rule of the statute

a statement that the notice would be sufficient if it would put a reasonably prudent man upon inquiry. See *Smathers v. Hotel Co.*, 162 N. C. 346.

Negligence as evidence of bad faith.—By the great weight of modern authority, gross negligence is evidence from which bad faith may be inferred, but it does not of itself constitute bad faith as a matter of law. That is a question for the jury after consideration of all the evidence. *Kipp v. Smith*, 137 Wis. 234, 238.

Weight of evidence.—Where the testimony as to the holder's good faith is undisputed it is the duty of the court to so charge the jury. *Van Slyke v. Rooks*, 181 Mich. 88. As to when evidence is not sufficient to support a verdict against the holder, see *Cole v. Harrison*, 167 App. Div. (N. Y.) 336; *Southwest Nat. Bank v. Baker*, 23 Idaho, 428; *McLaughlin v. Dopps*, 84 Wash. 442; *Commercial Security Co. v. Jack*, 29 N. D. 67. For the rule in Massachusetts, see *Phillips v. Eldridge*, 221 Mass. 103.

Signature obtained by duress.—Commercial paper executed under duress is void, even though there may be some consideration to support it. *Magoon v. Reber*, 76 Wis. 392.

Paper received from note broker.—The mere fact that the holder for value of a promissory note made by a third party receives it from a person engaged in the note-brokerage business, as collateral security for a loan to such broker, is not sufficient to raise a doubt as to the authority of the broker to so deal with the note. *American Ex. Nat. Bank v. New York Belting and Packing Company*, 148 N. Y. 698. And a bank has a right to assume, as to notes offered to it, whether for discount or as collateral security, by a customer who has an account with it, and who is in the habit of borrowing money from it, that the customer is acting in good faith and within his lawful rights; and the fact that the customer is engaged in the business of note-brokerage is not enough to deprive the bank of the right to indulge in such assumption. *Id.* The fraudulent misappropriation by the broker of the proceeds of discount is not sufficient to put the holder to the proof of his *bona fides*. *Sloan v. The Union Banking Company*, 67 Pa. St. 470.

Indorsement without recourse.—As under section thirty-six a qualified indorsement, that is to say, an indorsement without recourse to the indorser, does not impair the negotiable character

of the instrument, it may not be regarded as evidence of any infirmity in the instrument or defect in the title of the person negotiating the same. *Leavitt v. Thurston*, 38 Utah, 351; *Page v. Ford*, 65 Ore. 450; *Bank of Sampson v. Hatcher*, 151 N. C. 359. But upon the question of good faith, the fact that the indorsement was in this form may be considered in connection with the other circumstances of the case. *Merchants Nat. Bank v. Vranson*, 165 N. C. 344.

Post-dated instrument.—The negotiation of a post-dated check before the day of its date does not put the indorsee upon notice. *Triphonoff v. Sweeney*, 65 Ore. 209; *Albert v. Hoffman*, 64 Misc. (N. Y.) 87. See section 12.

§ 57. Rights of holder in due course.—A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Variant readings.—In Illinois, after the word “themselves,” the following is interpolated: “except the defect and the defense specified in § 10 of an Act entitled ‘An Act to revise the law in relation to promissory notes, bonds, due-bills and other instruments in writing,’ approved March 18, 1874, in force July 1, 1874, and except the defect and defense specified in §§ 131 and 136 of an Act to revise the law in relation to criminal jurisprudence, approved March 27, 1874, in force July 1, 1874, known as §§ 131 and 136 of chapter 38 of the Revised Statutes of Illinois.” In Wisconsin the following is added at the end of the section: “except as provided in §§ 1944 and 1945 of these statutes, relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provision of §§ 1676-25 of this act.”

Stolen securities.—Under this section, a holder in due course of a promissory note or check payable to bearer can acquire a good title thereto from one who has stolen it. *Massachusetts Nat. Bank v. Snow*, 187 Mass. 160; *Jefferson Bank v. Chapman*, 122 Tenn. 415; *Schaeffer v. Marsh*, 90 Misc. (N. Y.) 307. And this rule

applies to negotiable bonds payable to bearer. *City of Adrian v. Whitney Central Bank*, 180 Mich. 171, 179. But this section is to be read in connection with section 15; and if the instrument is incomplete when stolen, it is not valid in the hands of any holder. *Linick v. Nutting*, 140 App. Div. (N. Y.) 265; *Schaeffer v. Marsh*, *supra*.

Paper made in violation of statute.—One of the most important questions that has arisen under the Act is whether a holder in due course may recover upon paper void as between the immediate parties because given in violation of some statute, as, for example, where the instrument is given for a gambling debt, or is tainted with usury. A leading case upon the subject is *Wirt v. Stubblefield*, 17 App. Cas. D. C. 283. In that case it was held that under the Negotiable Instruments Law a *bona fide* holder may enforce a promissory note against the maker, even though the note was given for a gambling debt, and that this statute has repealed the statutes of 16 Car. 2 Ch. 7 and 9 Anne, Ch. 14, which were in force in the District of Columbia. In the course of the opinion it was said by Alvey, C. J.: "We know, moreover, that the great and leading object of the act, not only with Congress, but with the large number of the principal commercial states of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statute, was to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute, as against the original maker or acceptor, as is the case by the operation, indeed, by the express provision, of the Statutes of Charles and Anne.

Same subject—Rule in Kentucky and West Virginia.—But, on the other hand, it has been held in Kentucky and West Virginia that this section applies only to paper that might have been oblig-

atory between the parties to it, and that hence a holder in due course cannot recover where the note is void for usury, or has been given for a gambling debt, or in violation of the statute respecting "peddlers' notes." *Alexander v. Hazelrigg*, 123 Ky. 677; *Lawson v. First Nat. Bank*, 102 S. W. Rep. (Ky.) 324; *Citizens' Bank v. Crittenden Record Press*, 150 Ky. 634; *Holzbog v. Bakrow*, 156 Ky. 161; *Raleigh County Bank v. Poteet*, 74 W. Va. 511; *Twentieth Street Bank v. Jacobs*, 74 W. Va. 528. In the case first cited, the court said: "It has been the policy of this state to suppress gambling, and the statutes making gaming contracts void were founded upon what the legislature has for many years deemed to be sound public policy. It is not conceivable that the general assembly, in the passage of the act of 1904 for the protection of innocent holders of negotiable instruments, intended to or did repeal section 1955, Ky. St. 1903, which declares all gaming contracts void. In our opinion, the disappointment now and then of an innocent holder of a negotiable instrument would not be as hurtful and injurious to the best interests of the state as the removal of the ban from gaming contracts." And in the other Kentucky case cited it was said: "The negotiable instruments statute is a most comprehensive piece of legislation. It goes into minutest detail in dealing with the subjects embraced by it. The whole scope of it is shown to be the dealing with commercial paper, so as to protect innocent purchasers of such against mere defenses available as between the original parties. It gives such paper currency, free from original defenses. But it applies only to paper that might have been obligatory between the parties. But, where the parties were never bound because the law made the note void, as contrary to public policy as expressed in the statutes, the negotiable instruments act does not apply, and ought not to. The prevention of crime is of more importance than the fostering of commerce. The later act should be read in view of its purpose, and not as intending to repeal other statutes passed in the exercise of the police power of the state to suppress crime and fraud." Compare *Kushner v. Abbott*, 156 Iowa, 598; *American Savings Bank v. Helgersen*, 64 Wash. 54; *Gray v. Boyle*, 55 Id. 598.

Same subject—Rule in New York.—In New York there has been no decision upon the point by the Court of Appeals, and the decisions of the lower courts are conflicting. In the late case of

Sabine v. Paine, 166 App. Div. 9, the Appellate Division for the Second Department held that, notwithstanding the provision of section 96 of the Negotiable Instruments Law, the rule still obtains that a negotiable instrument which is void in its inception because of usury is invalid as against the maker even in the hands of a holder in due course. See also *Strickland v. Henry*, 66 App. Div. 23; *Oppikofer v. Murphy*, 146 App. Div. 581. But the contrary has been held by the Appellate Term for the First Department. *Klar v. Kostiuk*, 65 Misc. 199; *Emanuel v. Misicki*, 149 N. Y. Supp. 905; *Oeser v. Behrend*, 89 Misc. 391. In the case last cited *Shearn, J.*, said: "I do not argee that this decision practically writes the inhibition against usury from the statutes, but rather with Mr. Justice Laughlin, in *Schlesinger v. Kelly*, 114 App. Div. 546, where he said: 'The usury laws remain in full force, but to facilitate the free circulation of negotiable paper by protecting holders thereof in due course for value in their right to enforce the same, the usury laws are to that extent superseded by the provisions of section 96 of the Negotiable Instrument Law.' And in *Schlesinger v. Lehmaier* (191 N. Y. 69) the Court of Appeals held that the provisions of the State Banking Law on the subject of usury are to be construed in connection with section 96 of the Negotiable Instruments Law, and that a bank which had purchased paper infected with usury, could not recover on the same without showing that it became a holder in due course. The court said: "It pertains to negotiable instruments, and should be construed in connection with the other legislation upon the same subject. In the Negotiable Instruments Law it is expressly provided that a holder, who becomes such before maturity in good faith and for value without notice of any infirmity, holds the same 'free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce the payment of the instrument for the full amount thereof against all parties liable thereon.' Here we have the legislative intent expressed in clear and unmistakable language. It establishes a just and proper rule, which protects the bank in making purchases of commercial paper in good faith before maturity, for value and without notice of infirmity. But where it purchases with actual knowledge of the infirmity or defect or knowledge of such facts that its action in taking the instrument amounted to bad faith, it is not protected." See also *Schlesinger v. Gilhooly*,

189 N. Y. 1, 34; *Schelsinger v. Kelly*, 114 App. Div. (N. Y.) 546, 552-555; *Broadway Trust Co. v. Manheimer*, 47 Misc. (N. Y.) 465.

Reason for conflicting opinions.—The subject is one, perhaps, upon which the courts will never agree; for they will construe the section with reference to the policy of their respective states. In some states, the requirements of commerce will be the controlling consideration; in others, ~~the protection of the weak and the ignorant.~~ The modern view is admirably expressed in *Chemical Nat. Bank v. Kellogg* (183 N. Y. 92), where it was said by Vann, J.: "The business of the country is done so largely by means of commercial paper that the interests of commerce require that a promissory note, fair on its face, should be as negotiable as a government bond. Every restriction upon the circulation of negotiable paper is an injury to the state, for it tends to derange trade and hinder the transaction of business." And it is plain that if a negotiable instrument is to be void in the hands of a holder in due course, because it was given for a usurious loan, or for a gambling debt, or to a "peddler," or for the price of a stallion, or for a lightning rod, not merely that instrument alone is affected, but a doubt is cast upon all commercial paper originating in that community. For other cases applying local statutes, see *Quiggle v. Herman*, 131 Wis. 379 (note given for a stallion), *Arndt v. Sjoblom*, 131 Wis. 642 (note given for lightning-rods), *National Bank of Commerce v. Pick*, 13 N. D. 74 (note given to foreign corporation having no state license), *Sullivan v. German Nat. Bank*, 18 Colo. App. 99 (certificate of deposit transferred for gambling debt), *Gordon v. Levine*, 194 Mass. 418 (note made on Sunday).

Drunkenness as a defense.—In Wisconsin this section has been so changed that a holder in due course takes no title where the note was absolutely void in its inception because of the intoxication of the maker, destroying the rational faculties of the mind. *Green v. Gunsten*, 154 Wis. 69.

Defense of usury by indorser.—Under the statute an indorser cannot, as against a holder in due course, set up the defense that the instrument is void for usury in its inception; for the obligation of the indorser is a separate and independent contract. *Horowitz v. Wollowitz*, 59 Miss. (N. Y.) 520.

Amount of recovery.—The rule adopted in the statute is that of the Supreme Court of the United States. *Cromwell v. County of Sac*, 96 U. S. 51, 60. There was considerable conflict in the decisions of the State courts. In the case cited the Supreme Court said: "We are of opinion that a purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities and those of private corporations are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one-half of their nominal to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect impinges upon the doctrine that one who makes a loan upon such paper, or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured." See also *Birrell v. Dickerson*, 64 Conn. 61; *Rowland v. Fowler*, 47 Conn. 349; *Williams v. Huntington*, 68 Md. 590; *Moore v. Baird*, 30 Pa. 136. The statute changes the rule in New York. *Harger v. Wilson*, 63 Barb. 237; *Huff v. Wagner*, 63 Barb. 230; *Todd v. Shelbourne*, 8 Hun, 512. See also *Holcomb v. Wyckoff*, 35 N. J. Law 38; *Bramhall v. Atlantic National Bank*, 36 N. J. Law 243; *Oppenheimer v. Farmers' and Mechanics' Bank*, 97 Tenn. 19. Under this section, a *bona fide* purchaser of a note and mortgage, is not limited to a recovery of the amount paid therefor, but is entitled to enforce the same for the full amount due thereon, even though the execution of the note was induced by fraud, and it was bought at a heavy discount. *Lassas v. McCarty*, 47 Ore. 474; *McNamara v. Jose*, 28 Wash. 461. Or though the note was without consideration and invalid as between the maker and the payee. *Jefferson Bank v. Chapman*, 122 Tenn. 416. As to amount of recovery where the instrument is taken as collateral security, see

section 27. For cases where the purchaser has paid only part of the amount agreed to be paid before receiving notice, see section 54.

Right of election as to parties to sue.—Though the statute confers upon the holder the right to enforce payment against all the parties liable upon the instrument, he has a right of election as to whom he will sue, and the party sued cannot complain that other parties equally liable are not sued. *Chateau Trust & Banking Co. v. Smith*, 133 Ky. 418; *Curtis v. Davidson*, 215 N. Y. 395.

§ 58. When subject to original defenses.—In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

Variant readings.—In Illinois and Wisconsin the word “duress” is interpolated after the word “fraud” in the second sentence. In Alabama, the words “has all the rights of such latter” are substituted for all after the word “instrument” in the second sentence. In North Dakota the word “holder” is substituted for “latter” at the end of the section. In Illinois and Wisconsin, the words “such holder” are substituted for “latter.”

Evidence contradicting writing.—Under this section a party cannot interpose a defense which denies the tenor of the note or bill. *Bradley Engineering Co. v. Heyburn*, 56 Wash. 628.

What defenses may be interposed.—It was not deemed expedient to make provision as to what equities the transferee will be subject to; for the matter may be affected by the statutes of the various states relating to set-off and counter-claim. In an act designed to be uniform in the various states, no more could be done than fix the rights of holders in due course. On the question whether only such equities may be asserted as attach to the paper, or whether equities arising out of collateral matters may also be asserted, the decisions are conflicting. In England it was decided in *Burroughs v. Moss*,

10 Barn. & Cress. 558, that the indorsee of an overdue bill is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters, such as a general set-off is. This is a leading case, and has since been uniformly followed in that country. *Stein v. Yglesias*, 1 Crom. Mees. & Ros. 565; *Whitehead v. Walker*, 10 Mees. & Welsb. 696. See also *Hughes v. Large*, 2 Pa. St. 103; *Long v. Rhawn*, 75 Pa. St. 128; *Young v. Shriner*, 80 Pa. St. 463; *Davis v. Miller*, 14 Gratt. 1; *Kilcrease v. White*, 6 Fla. 45; *Cumberland Bank v. Haun*, 3 Harrison, 223; *Chandler v. Drew*, 6 N. H. 469; *Robertson v. Breedlone*, 7 Porter, 541; *Tuscumbia, etc., R. R. Co. v. Rhodes*, 8 Ala. 206-224; *Robinson v. Lyman*, 10 Conn. 81; *Steadman v. Jilman*, Id. 56; *Adair v. Lenox*, 15 Oregon, 489. Under the statute the defenses available against the holder are only such as exist at the time of the assignment. *Marling v. FitzGerald*, 138 Wis. 93. Thus, a person to whom the instrument is transferred as a gift takes it subject to all equities then existing between the original parties, but not subject to those which arise thereafter. *First Nat. Bank of Champlain v. Wood*, 128 N. Y. 35; *Baxter v. Little*, 6 Met. 7. For a case applying this section, see *Craig v. Palo Alto Stock Farm*, 16 Idaho, 701.

Person claiming under holder in due course.—Whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities its character as an available security is established, and its holder can transfer it to others with the like immunity. *Cover v. Myers*, 75 Md. 406; *Black v. First National Bank of Westminster*, 96 Md. 399. The principle is, that the promise being good to the prior indorsee or holder, free from objection on the ground of fraudulent or illegal consideration, he has the power of transferring it to others, with the same immunity, as an incident to the legal right which he had acquired in the instrument. *Kinney v. Kruse*, 28 Wis. 183, 190-191. See also *Boyd v. McCann*, 10 Md. 118. Thus, if A gives to B his note, and C becomes the holder thereof in due course, any subsequent holder could stand on C's title and enforce the note against A, though before taking the same he had notice of a defense which A had to the note as against B. But if, in the case supposed, the note should be indorsed by C to D, and by the latter to E, and by him to F, under circumstances which would give D a defense as a party thereto, then if F had notice of the equities of both A and D he could enforce the note against A,

but not against D. For cases applying this provision of the section, see *McMurray v. McMurray*, 258 Mo. 405, 417; *Horan v. Mason*, 141 App. Div. (N. Y.) 89.

§ 59. Presumption—burden of proof—exception.—Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

Common-law rule.—The rule adopted in the statute is the one which prevailed in New York and many other states. *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 191; *Joy v. Diefendorf*, 130 N. Y. 6; *Jordan v. Grover*, 99 Cal. 194; *Market and Fulton Nat. Bank v. Sargent*, 85 Me. 349; *Haines v. Merrill*, 56 N. J. Law, 312; *Sullivan v. Langley*, 120 Mass. 437; *Merchants' National Bank v. Haverhill Iron Works*, 159 Mass. 158; *Conant v. Johnston*, 165 Mass. 450, 452; *National Revere Bank v. Morse*, 163 Mass. 381, 385; *Williams v. Huntington*, 68 Md. 590; *Griffith v. Shipley*, 74 Md. 591; *Ellicott v. Martin*, 6 Md. 509; *Hutchinson v. Boggs & Kirk*, 28 Pa. St. 294; *Wilson v. Lazier*, 11 Gratt. 477; *Vathir v. Zane*, 6 Gratt. 246. The rule which obtained in the Federal Courts imposed upon the defendant the burden of proving bad faith. *First Nat. Bank v. Moore*, 148 Fed. Rep. 953, 957; *Murray v. Lardner*, 2 Wall. 110; *Hotchkiss v. National Bank*, 21 Wall. 354; *Collins v. Gilbert*, 94 U. S. 753; *King v. Doane*, 139 U. S. 166.

Burden of proof.—Under this section it is not necessary for the holder to offer in the first instance any proof that he is a holder in due course. *Kerr v. Anderson*, 16 N. D. 36; *Bruce v. Citizens' Bank*, 185 Ala. 221. But when it is shown that the title of a prior holder was defective the burden shifts to the plaintiff. *Interboro Brewing Co. v. Doyle*, 165 App. Div. (N. Y.) 646; *Peterson v. Fowler*, 162 Id. 21; *Eisenberg v. Lefkowitz*, 142 Id. 570; *German-American Bank v. Cunningham*, 97 Id. 244; *Mitchell v. Baldwin*,

88 Id. 265, 269; Waxberg v. Stappler, 83 Misc. (N. Y.) 78; Justice v. Stonecipher, 267 Ill. 448; Arnd v. Aylesworth, 145 Iowa, 185; McKnight v. Parsons, 136 Iowa, 390; Ireland v. Shore, 91 Kans. 326; Campbell v. Fourth Nat. Bank, 137 Ky. 555; Callahan v. Louisville Dry Goods Co., 140 Ky. 714; Asbury v. Taube, 151 Ky. 142; Muir v. Edelen, 156 Ky. 212; Lewiston Trust & S. D. Co. v. Shackford, 213 Mass. 432; Register's Sons Co. v. Reed, 185 Mass. 226, 227; Phillips v. Eldridge, 221 Mass. 103; Harris v. Johnson, 89 Conn. 128; People's State Bank v. Miller, 152 N. W. Rep. (Mich.) 257; Hill v. Dillon, 176 Mo. App. 192, 198; Ostenberg v. Kanka, 95 Neb. 314, 316; Piper v. Neylon, 88 Neb. 253; Fidelity Trust Co. v. Ellen, 163 N. C. 45; American Nat. Bank v. Fountain, 148 N. C. 590; Fidelity Trust Co. v. Whitehead, 165 N. C. 74; Singer Mfg. Co. v. Summers, 143 N. C. 102; Standard Trust Co. v. Commercial Nat. Bank, 167 N. C. 260; Schulthers v. Sellers, 223 Pa. St. 516; Second Nat. Bank v. Hoffman, 229 Pa. St. 429; Cook v. Am. Tubing & Webbing Co., 28 R. I. 41; Leavitt v. Thurston, 38 Utah, 351; Keene v. Behan, 40 Wash. 505; Hodge v. Smith, 130 Wis. 326; Grebe v. Swords, 28 N. D. 330; Stotts v. Fairfield, 163 Iowa, 726; City of Adrian v. Whitney Central Nat. Bank, 180 Mich. 171. And the statute requires the holder to show affirmatively the facts constituting good faith on his part. Keene v. Behan, 40 Wash. 505. See also other cases cited above. And where the plaintiff seeks to establish this by his own testimony, the credibility of such testimony, though it is undisputed, is for the jury. Joy v. Diefendorf, 130 N. Y. 6.

Inference as to good or bad faith.—Where an inference may be drawn from the surrounding circumstances that on the one hand tends to discredit plaintiff's testimony as to his lack of knowledge concerning the infirmity in the paper and his good faith in taking it, and on the other hand tends to establish his good faith, the question is for the jury. Matlock v. Scheuerman, 51 Ore. 49; McKnight v. Parsons, 136 Iowa, 390; M. Groh's Son's Co. v. Schneider, 34 Misc. (N. Y.) 195. In Massachusetts, the rule is well settled that when testimony warranting a finding that the plaintiff was a holder in due course of a note originating in fraud is given by witnesses called by the plaintiff, a verdict cannot be directed for the plaintiff as a matter of law. Phillips v. Eldridge, 221 Mass. 103.

Testimony as to good faith.—The holder may testify that he acted in good faith. *Smathers v. Taxaway Hotel Co.*, 167 N. C. 474.

Presumption when paper is stolen.—Where negotiable securities have been stolen and negotiated, the burden is upon the holder to show that he is himself a holder in due course, or that he claims under such a holder; and there is no presumption that the thief negotiated the securities before they became due. *Northampton Nat. Bank v. Kidder*, 106 N. Y. 221; *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 147.

Where payee is described as trustee.—That the payee is described as "trustee" does not let in defenses against a *bona fide* holder for value. *Bank v. Looney*, 99 Tenn. 278.

Instruction limiting proof.—Under this section an instruction that the burden is on the holder to show "that some person under whom he claims acquired the title in good faith," is erroneous. *Hawkins v. Young*, 127 Iowa, 281.

Failure of consideration.—The provision of this section which imposes upon the holder the burden of proof does not apply where the defense is failure of consideration, since section fifty-five, which defines a defective title, does not include such a case. *Bank of Polk v. Wood*, 189 Mo. App. 62, 67; *Broderick & Bascom Rope Co. v. McGrath*, 81 Misc. (N. Y.) 199; *Cole Banking Co. v. Sinclair*, 34 Utah, 454.

Breach of warranty.—So, such provision does not apply where the defense is breach of warranty. *Ireland v. Shore*, 91 Kans. 326, 329.

Where fraud is subsequent to liability.—The last sentence is necessary to qualify the general statement. If A issues his note to B, and C gets possession of it and fraudulently negotiates it to D, the fraud of C in nowise affects A, and is no defense to him when sued on the instrument by D. Thus, it has been held that the fact that one who held possession of a note for the payee puts it in circulation in fraud of his rights is no defense in a suit by the holder against the maker; nor does it change the burden of proof, so as to require the plaintiff to show in the first instance that he is a *bona fide* holder for value. *Kinney v. Kruse*, 28 Wis. 183.

ARTICLE VI.

LIABILITY OF PARTIES.

Section 60. Liability of maker.

61. Liability of drawer.

62. Liability of acceptor.

63. When person deemed indorser.

64. Liability of irregular indorser.

65. Warranty where negotiation by delivery
or qualified indorsement.

66. Liability of general indorser.

67. Liability of indorser where paper negoti-
able by delivery.

68. Order in which indorsers are liable.

69. Liability of agent or broker.

§ 60. Liability of maker.—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

Where there is more than one maker.—When a promissory note is executed by two persons jointly and severally the presumption is that the debt was created for their equal benefit, and the burden of proving that one of the makers signed the note as surety for the other is upon the party alleging it. *Brady v. Brady*, 110 Md. 656. But a joint action cannot be maintained against all the makers, where the note on its face states that the liability of each is limited to a proportional part of the amount. *National Bank of Phoenixville v. Buckwalter*, 214 Pa. St. 289.

Where note secured by collateral.—The fact that the holder had other collateral securities for the same debt more than sufficient to cover it, from which, however, the debt had not been realized, is not a ground of defense on the part of the maker. *Lord v. Ocean Bank*, 20 Pa. St. 384.

Where payment secured by indorser.—The fact that the indorser has deposited with the holder security for the payment of the note is no defense to the maker in an action by the holder. *People's Nat. Bank v. Rice*, 149 App. Div. (N. Y.) 18.

Liability of accommodation maker.—Under the statute the maker of a promissory note is "primarily liable" thereon, though he signs only for accommodation. *Vanderford v. Farmers', etc., Nat. Bank*, 105 Md. 164; *Richards v. Market Exchange Bank*, 81 Ohio St. 348; *First State Bank v. Williams*, 164 Ky. 143; *Fritts v. Kirchdorfer*, 136 Ky. 643; *Murphy v. Panter*, 62 Ore. 522; *Hunter v. Harris*, 63 Ore. 505; *Cellers v. Meachem*, 49 Ore. 186; *Walstenholme v. Smith*, 34 Utah, 300; *Bradley Engineering, etc., Co. v. Heyburn*, 56 Wash. 628; *First Nat. Bank v. Meyer*, 152 N. W. Rep. (N. D.) 657. See note to section 120.

Existence of payee.—Where the name of the payee is a trade or assumed name, and the instrument is issued for value, the maker is estopped from setting up that the instrument is payable to a fictitious payee, if by such averment the instrument would be defeated. *Jones v. Home Furnishing Co.*, 9 App. Div. (N. Y.) 103.

§ 61. Liability of drawer.—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

Variant readings.—In Colorado and Illinois, the word "subsequent" near the end of the first sentence is omitted. In North Carolina, through what was doubtless an error in engrossing, the word "negotiating" is substituted for "negating," near the end of the section. In New York, through an error in engrossing, the word "and" has been substituted for "or" between the words "accepted" and "paid."

§ 62. Liability of acceptor.—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

2. The existence of the payee and his then capacity to indorse.

Variant readings.—In Kentucky and Missouri the word “ then ” in subdivision two is omitted.

Drawer's signature—Rule at common law.—Ever since the decision in *Price v. Neal*, 3 Burrows, 1354, it has been a settled rule of commercial law that the drawee is presumed to know the signature of the drawer; and if he pays a bill to which the drawer's name has been forged he is bound by the act and cannot recover the money. The law proceeds upon the theory that the drawee must know the signature of his correspondent much better than the holder can, and that, therefore, the holder may cast upon him the entire responsibility of determining as to the genuineness of the instrument. If he fails to discover the forgery the law imputes to him negligence, and although he has made the payment under a mistake, and parts with his money without receiving the supposed equivalent, and although the holder has obtained the money without consideration, still the drawee cannot be relieved from the consequences of his neglect at the expense of the holder, and the latter may retain the money in equity and good conscience. See *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333; *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. 67; *Nat. Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; *Bank of St. Albans v. Mechanics' Bank*, 10 Vt. 141; *Commercial & Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11; *Levy v. Bank of the United States*, 4 Dallas, 234; S. C. 1 Binney, 27.

Same subject—Rule under the statute.—The rule laid down in *Price v. Neal* (*supra*), has been adopted in the statute. Title *Guarantee & Trust Co. v. Haven*, 196 N. Y. 487, 492; *Nat. Bank of Rolla v. First Nat. Bank of Salem*, 141 Mo. App. 719; *Bank of Commerce v. Mechanics' Nat. Bank*, 148 Mo. App. 1; *Farmers' Nat. Bank of Augusta v. Farmers', etc., Bank of Maysville*, 159 Ky. 141; *First Nat. Bank v. Bank of Cottage Grove*, 59 Ore. 388;

Cherokee Nat. Bank v. Union Trust Co., 33 Okla. 342; **State Bank v. Cumberland S. & G. Co.**, 168 N. C. 605.

Rule in Pennsylvania.—In Pennsylvania this matter is regulated by the statute of 1849, which was not repealed by the Negotiable Instruments Law. **Union Nat. Bank v. Franklin Nat. Bank**, 249 Pa. 375. The effect of that statute and the cases upon the subject is that the mere acceptance or payment of forged paper is not of itself a bar to the recovery of the money by the party paying, nor is such party absolutely bound to discover and give notice of the forgery on the very day of payment. All that he need do in any case is to give ample notice promptly according to the circumstances and the usage of the business, and unless the position of the party receiving the money has been altered for the worse in the meantime the date of the notice is not material. **Iron City Nat. Bank v. Fort Pitt Nat. Bank**, 159 Pa. St. 46, 52.

Rule in other states.—For other cases on this subject, see **People's Bank v. Franklin Bank**, 88 Tenn. 299; **First Nat. Bank of Danvers v. First Nat. Bank of Salem**, 151 Mass. 280; **Nat. Bank of North America v. Bangs**, 160 Mass. 441; **Ellis v. Insurance Company**, 4 Ohio St. 268; **First Nat. Bank v. Ricker**, 71 Ill. 439; **Rouvant v. San Antonio Nat. Bank**, 63 Tex. 610; **Deposit Bank of Georgetown v. Fayette Nat. Bank**, 90 Ky. 10.

Indorsement of payee, etc.—Acceptance admits the signature of the drawer, but is no proof or admission of the indorsement by the payee, whether the bill be payable to the drawer's own order or to the order of another person. **Williams v. Drexel**, 14 Md. 566. And the drawee is not presumed to know the handwriting in the body of the instrument. **Continental Nat. Bank v. Tradesman's Bank**, 36 App. Div. (N. Y.) 112; **Gunston v. Heat and Power Co.**, 181 Pa. St. 327.

Capacity of drawer.—Thus, if the bill is drawn by a corporation, the acceptor cannot set up as a defense that it was without legal capacity to draw the bill. **Halifax v. Lyle**, 3 Welsby, H. & G. 446. So, if the bill is drawn by an infant, **Jones v. Darch**, 4 Price, 300; **Taylor v. Croker**, 4 Esp. 187; or a married woman, **Cowton v. Wickersham**, 54 Pa. St. 302.

Authority to draw.—The delivery of a bill or check by one person to another for value implies a representation on the part of

the drawer that the drawee is in funds for its payment, and the subsequent acceptance of such check or bill constitutes an admission of the truth of the representation, which the drawer is not allowed to retract. By such acceptance the drawee admits the truth of the representation, and having obtained a suspension of the holder's remedies against the drawer, and an extension of credit by his admission, he is not afterward at liberty to controvert the fact as against a holder in due course. *Heuertematte v. Morris*, 101 N. Y. 63, 70.

Acceptance for accommodation.—If the acceptance be for the drawer's accommodation the acceptor does not thereby become entitled to sue the drawer upon the bill; but when he has paid the bill, and not before, he may recover back the amount from the drawer in an action for money had and received. *Christian v. Keen*, 80 Va. 369, 377. See also *Whitwell v. Brigham*, 19 Pick. 117; *Henderson v. Thornton*, 37 Miss. 448; *Suydam v. Combs*, 3 Green (N. J.) 133.

Capacity of payee to indorse.—Thus, the acceptor would not be permitted to show that the payee at the time of the acceptance was a lunatic. *Smith v. Marsack*, 6 C. B. 486.

§ 63. When person deemed indorser.—A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

Indication of intention to be bound otherwise.—The intention to be bound in some capacity other than as indorser must be indicated by appropriate language used for that purpose; and such intention may not be inferred from conduct, or from language that is equivocal. *McDonald v. Luckenbach*, 170 Fed. Rep. 434, 95 C. C. A. 604, 607. But where one wrote upon the back of a note the words "I hereby guarantee payment of the within note," it was held that he had by the appropriate word "guarantee" indicated his intention not to be bound as indorser. *Noble v. Beeman, Spaulding Co.*, 65 Oregon, 93. So, where the person signing bound himself to pay the amount at maturity "without condition," he was held not to be an indorser. *Hibernia Bank*

& Trust Co. v. Dresser, 132 La. 532. For a case applying this section, see *Lewy v. Wilkinson*, 135 La. 105.

Officers of corporation indorsing.—Under this section the fact that persons who sign their names in blank upon a note given by a corporation are officers of the corporation, and execute the note in its behalf, does not enlarge their individual liability, and bind them otherwise than as indorsers. *McDonald v. Luckenbach*, 170 Fed. Rep. 434.

Partner indorsing individually.—Under this section a partner, by individually indorsing a firm note, adds to his liability as maker a several and distinct liability as indorser. *Nat. Exchange Bank v. Lubrano*, 29 R. I. 64; *Fourth Nat. Bank v. Mead*, 216 Mass. 521. See note to section 64.

Parol evidence to vary status.—Under this section parol evidence is not admissible to show that one who signed as an indorser intended to be bound as a maker, since this would be to vary the legal effect of the written instrument. *First Nat. Bank v. Bickel*, 143 Ky. 754; *Hopkins v. Commercial Bank*, 64 Fla. 310; *Baumeister v. Kuntz*, 53 Fla. 340; *Ensign v. Flagg*, 177 Mich. 317. In a late case in Maryland the Court of Appeals of that state said: "Since the enactment of the negotiable instruments act by the different states, the questions raised by the preceding sections have received much judicial consideration, although they have not been raised directly in this court. We have made a diligent search through the many state reports, and have found an absolute unanimity of opinion. Everywhere it has been held that the words of section 82 are to be taken in their literal sense. That is, if a person places his name on an instrument other than as a maker, drawer, or acceptor, he is only to be held to the obligations of an indorser, unless he adds words to indicate otherwise. The act does not merely raise a presumption that he is an indorser, but his status to the instrument is fixed by it, and cannot be changed by parol proof." *Lichtner v. Roach*, 95 Atl. Rep. (Md.) 62. But in a case in Tennessee, however (*Mercantile Bank v. Busby*, 120 Tenn. 652), parol evidence was admitted to show that certain stockholders of a corporation, who had placed their signatures on the back of a promissory note made by another stockholder, intended to bind themselves as joint makers, and were liable though not given notice of dishonor. But this seems to be a confusion of legal principles. To

show the agreement between persons who are only secondarily liable, as authorized by section 68, does not contradict the writing itself; but to show that a party who appears upon the paper as an indorser, and, therefore, liable secondarily, is in fact a maker and liable primarily, certainly varies the legal effect of the instrument. The nature and extent of the contract is implied by law from the fact that the name of the indorser is written across the back of the bill or note (see Sec. 63); and the contract arising from a signature so placed is as well settled as though the terms thereof had been written out above the signature; and parol evidence is just as inadmissible in regard to this contract as in regard to any other contract in writing. *Bird v. Kay*, 40 App. Div. (N. Y.) 533, 537; *Hodgens v. Jennings*, 148 Id. 879, 881.

§ 64. Liability of irregular indorser.—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

Variant readings.—In Illinois the following changes are made: For subdivision one, the following is substituted: "If the instrument is a note or bill, payable to the order of a third person, or an accepted bill, payable to the order of the drawer, he is liable to the payee and to all subsequent parties;" and for subdivision two, the following: "If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer."

Reason for rule adopted in statute.—This section is intended to cover irregular indorsements. On this subject the decisions

were very conflicting. In some jurisdictions a person placing his signature on the back of a note before the payee has indorsed was deemed a joint maker. *Good v. Martin*, 95 U. S. 93; *National Exchange Bank v. Cumberland Lumber Co.*, 100 Tenn. 479; *Logan v. Ogden*, 101 Tenn. 392; *Bank of Jamaica v. Jefferson*, 92 Tenn. 537; *Melton v. Brown*, 25 Fla. 461; *Schroeder v. Turner*, 68 Md. 506. In other jurisdictions he was regarded as a guarantor. In still others he was considered an indorser. And those courts which held him to be an indorser differed as to whether he was a first or second indorser. The rule adopted in the statute is embodied in part in section 3117 of the Civil Code of California, which reads: "One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon, as an indorser." The California rule was adopted because it is conducive to certainty, and because it appears to accord more nearly with what must have been the intention of the parties. When a plain man puts his signature on the back of a negotiable instrument he ordinarily understands that he is becoming liable as an indorser; and if he puts it there before the instrument is delivered, he usually does so for the purpose of giving the maker or drawer credit with the payee or other person to whom it is negotiated. The following observation in *Connors v. Taylor* (13 Wis. 224, 229), seems to embody much practical good sense: "Obviously, a person indorsing a note before delivery thereof to the payee intends rendering himself liable to the payee in some character and upon some ground. He must intend and design to secure its payment and give credit to the paper by placing his name upon it, even in the hands of the payee." In many of the cases the reasoning was highly technical, and the decisions were based upon considerations which, in all probability, never entered the heads of the parties themselves. The California Code makes no provision for a case where the instrument is drawn to the order of the maker or drawer. This is covered by subdivision 2, above. Subdivision 3 was added to provide for a case where, the payee being unable to enforce payment, there might be a question whether the indorser would be liable to a person claiming under the payee.

Changes made by the statute.—In New York prior to the statute a person indorsing in blank before delivery to the payee was *prima facie* deemed to be a second indorser, and hence not liable

to the payee, who was supposed to be the first indorser. *Bacon v. Burnham*, 37 N. Y. 614; *Phelps v. Vischer*, 50 N. Y. 69. The same rule prevailed in Pennsylvania. *Eilbert v. Finkbeiner*, 68 Pa. St. 243; *Central Nat. Bank v. Dreydoppel*, 134 Pa. St. 499. And in Oregon. *Deering v. Creighton*, 19 Oregon, 118; *Cogswell v. Hayden*, 5 Oregon, 22. But as the paper itself furnished only *prima facie* evidence of this intention, it was competent to rebut the presumption by parol proof that the indorsement was made to give the maker credit with the payee. *Coulter v. Richmond*, 59 N. Y. 478. The statute has changed the law in New York, New Jersey, Pennsylvania, Rhode Island, Ohio, Missouri, and other states. *Far Rockaway Bank v. Norton*, 186 N. Y. 484; *Haddock, Blanchard & Co., Inc., v. Haddock*, 192 N. Y. 499; *Wilson v. Hendee*, 74 N. J. L. 640; *Hibbs v. Guaraglia*, 75 N. J. L. 168; *Rockfield v. First Nat. Bank of Springfield*, 77 Ohio St. 311; *Deahy v. Choquet*, 28 R. I. 338; *Walker v. Dunham*, 135 Mo. App. 396; *American Trust Co. v. Canevin*, 184 Fed. Rep. 657. And now, where it is sought to hold an irregular indorser, demand and notice of dishonor must be shown as in other instances. See cases cited above.

Partner indorsing individually.—The words of this section, “not otherwise a party,” do not change the rule that a partner indorsing individually is a party different from the partnership and incurs a double liability arising from the two distinct contracts by which he has bound himself. *Fourth Nat. Bank v. Mead*, 216 Mass. 521. In this case it was said: “The act is designed in part as a codification for the practical use of business men. It ought to be interpreted so as to be a help, and not a hindrance, to the easy ascertainment of the rights and liabilities of the several parties to commercial paper. To this end the words in section 81, ‘a person, not otherwise a party,’ must refer to one who appears and can be recognized from that which is written within the four corners of the instrument as a ‘party.’ Partnerships often assume a style or designation which affords no clue to those who are its members. It might not infrequently be a hardship to compel the holder of firm paper which bears an indorsement made before delivery to ascertain at his peril whether the person making such indorsement was ‘otherwise a party to the instrument’ through being one of the partnership which was maker.”

Accommodation indorser.—Under this section an indorser who has signed for the accommodation of the maker before the paper was indorsed by the payee, may defend upon the ground of invalidity or want of consideration in the same way that the maker could do, if the action were against him. *Leonard v. Draper*, 187 Mass. 536.

Parol evidence.—This section does not, however, fix the rights of the various indorsers as between themselves; the latter liability is governed by section 68 under which evidence is admissible to show an agreement as to the order in which they shall be liable. *Haddock, Blanchard & Co., Inc., v. Haddock*, 192 N. Y. 499; S. C. 118 App. Div. 412; *Kohn v. Consolidated Butter & Egg Co.*, 30 Misc. (N. Y.) 725; *Wilson v. Hendee*, 74 N. J. L. 640. But as the statute declares the liability to be that of an indorser, the holder is not permitted to show that the party so signing meant to bind himself as guarantor. *Farquhar Co. v. Highman*, 16 N. D. 106. See note to sec. 68.

Pleading—Burden of proof.—Where the holder seeks to hold a party liable under this section he must allege and prove that the paper was so indorsed before its delivery, and the burden of proof as to this fact is upon him. *Bender v. Bahr Trucking Co.*, 144 App. Div. (N. Y.) 742.

ILLUSTRATIONS.

Note made by A payable to order of B, indorsed by C, and afterward delivered to B. C is liable as indorser to B.

Note made by A payable to order of himself, indorsed by B, and afterward delivered to C. B is liable as indorser to C.

Note made by A to order of B, indorsed by C before B, but for accommodation of B, and discounted by Bank of X. C is liable as indorser to Bank of X and not to B.

§ 65. Warranty where negotiation by delivery or qualified indorsement.—Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all prior parties had capacity to contract;

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

Express warranty.—This section refers, of course, only to the implied warranty. An express warranty may be so framed as to exclude all other warranties which would otherwise be implied by law. *Giffert v. West*, 37 Wis. 115.

Warranty of genuineness.—See *Littauer v. Goldman*, 72 N. Y. 506; *Whitney v. National Bank of Potsdam*, 45 N. Y. 303; *Herrick v. Whitney*, 15 Johns. 240; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Coolidge v. Brigham*, 5 Metc. 68. But if at the time of the transfer he expressly decline to warrant the genuineness of the instrument no such warranty will be implied. *Bell v. Dagg*, 60 N. Y. 528. But a general refusal to guarantee will not of itself exclude the implied warranty of genuineness. (*Id.*) The sale and transfer, for a full and fair price, of a note past due, indorsed in blank by the person to whose order it is payable, implies a warranty by the vendor that such indorsement is valid. *Giffert v. West*, 37 Wis. 115. See next section.

Warranty that instrument is valid.—It will be noted that the warranty mentioned in the next section, that the instrument is valid, is omitted from this section. The inference from such omission is, that a person negotiating commercial paper by delivery merely, or by a qualified indorsement, does not warrant that it is an enforceable contract, as, for example, that it is not void for usury. This was the New York rule (*Littauer v. Goldman*, 72 N. Y. 506), and while it has been criticized and disapproved by the Supreme Court of the United States (*Meyer v. Richards*, 163 U. S. 385), it seems to be the more convenient rule in practice. The contrary rule would often work great hardship, and would make the business of dealing in commercial paper extremely hazardous. A

broker, for example, buying and selling notes and bills, may assure himself that an instrument is genuine, and that the parties had capacity to contract, but he could not always know the circumstances under which the paper was made. On the other hand, the New York rule, which is conceived to be the rule of the statute, does no injury to the purchaser; for if he desires a warranty, he has only to exact it, or to require the indorsement of the seller. See sec. 67.

Warranty of title.—See *Meriden National Bank v. Gallaudet*, 120 N. Y. 298, 303.

Capacity of prior parties.—See *Littauer v. Goldman*, 72 N. Y. 506, 509. Under this section there is a warranty that the maker had power to contract, although the holder knew when he took the paper that the maker was a married woman. In *re Young's Estate*, 234 Pa. St. 287.

Knowledge of fact affecting validity of paper.—Thus, if he has knowledge that the paper is void for usury, he will be liable to the purchaser. *Littauer v. Goldman*, 72 N. Y. 506. But in such case *scienter* must be alleged and proved. (*Id.*) Compare *Meyer v. Richards*, 163 U. S. 385; *Wood v. Sheldon*, 42 N. J. Law, 425.

Public or corporate securities.—See *Otis v. Cullum*, 92 U. S. 488. This was an action against the vendor of municipal bonds payable to bearer, which were afterward declared void because the legislature had no power to pass the acts under which they were issued. It was held that no recovery could be had in the absence of an express warranty. The application of the rule of commercial paper in such cases would work great hardship and much public inconvenience.

§ 66. Liability of general indorser.—Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivisions one, two and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due present-

ment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

Variant readings.—In Illinois the following changes are made: The words “not an accommodating party” are interpolated after “every indorser” at the beginning of the section; the word “four” is substituted for “three” in the first subdivision; and the words “every indorser” for “he” near the beginning of the last paragraph.

Where paper is indorsed restrictively.—As this and the preceding section include the case of *every* indorser, the warranty as to genuineness will apply to one to whom the paper has been indorsed restrictively, as for example, where the indorsement is “for collection.” This undoubtedly changes the law; for the former rule was that the indorsement of a bank to which paper had been indorsed “for collection” did not import a guaranty of the genuineness of all prior indorsements, but only of the agent’s relation to the principal as stated upon the face of the paper; and it was held that, in such a case, the collecting bank was not liable after it had paid the proceeds to its principal, though a prior indorsement was a forgery. *United States v. American Exchange Nat. Bank*, 70 Fed. Rep. 232; *Nat. Park Bank v. Seaboard Nat. Bank*, 114 N. Y. 28. But this rule was exceedingly inconvenient in practice, and hence it was deemed expedient to make every indorser a warrantor of genuineness. There is no hardship in this rule, for each indorser has a right of recourse against all prior parties. The former rule, however, introduced such an element of uncertainty that the clearing-house associations throughout the country adopted rules to obviate its effects, and the bankers sent letters to their customers requesting that they discontinue the use of the indorsement “for deposit,” “for collection,” etc. In this, as in several other instances where the law was changed, the needs of the business community were deemed of more importance than technical principles.

To whom warranty runs.—Under this section, as under the rule of the law merchant, the warranty is in favor of *subsequent holders*

only, and since the adoption of the statute, as well as before, the indorser does not warrant to the drawee that the signature of the drawer is genuine. *Farmers' and Merchants' Bank v. Bank of Rutherford*, 115 Tenn. 64, 70-71. Thus, if a check purporting to be drawn by A should be indorsed by B and cashed by C, the indorsement of B would be a warranty in favor of C, but not in favor of the bank on which the check is drawn.

Warranty as to genuineness, title, etc.—See *Leonard v. Draper*, 187 Mass. 536. The warranty as to genuineness, title and capacity of prior parties (See sec. 65), applies even though the party is an accommodation indorser, and the fact was known to the holder when he took the instrument. *Packard v. Windholz*, 88 App. Div. (N. Y.) 365, *aff'd* 180 N. Y. 549; *Oriental Bank v. Gallo*, 112 App. Div. 360. The provision of the statute refers to the condition of the instrument on leaving the hands of the indorser, and hence, if the paper should be altered after that time, and before delivery, there is no warranty. *First Nat. Bank v. Gridley*, 112 App. Div. (N. Y.) 398. Thus, where a note payable to the order of several payees jointly, was indorsed by one of them, and forwarded by mail to the maker, who, before negotiating the instrument, erased the word "jointly," and struck out the name of one of the payees, and inserted his own in place thereof, it was held that the indorser was not liable. (*Id.*) The indorsement of a promissory note is a guaranty by the indorser to the indorsee that the prior indorsements on the note and the signature of the payor are genuine, and made by parties authorized to pass the title. *McConegby v. Kirk*, 68 Pa. St. 200; *Condon v. Pearce*, 43 Md. 83; *Lambert v. Pack*, 1 Salk. 127; *Critchlow v. Parry*, 2 Camp. 182; *Prescott Bank v. Caverly*, 7 Gray, 216, 220. Thus, one who indorses a promissory note, purporting to be executed by a firm, thereby impliedly contracts that the note was made by the firm in whose name it is executed, and he cannot dispute the fact in an action upon the indorsement. *Dalrymple v. Hillenbrand*, 62 N. Y. 5. And a second indorser cannot dispute the legal capacity of the payee to indorse on the ground that she was a married woman. *Prescott Bank v. Caverly*, 7 Gray, 216, 217. So, one indorsing the note of a corporation admits its capacity to execute the note. *Glidden v. Chamberlin*, 167 Mass. 486. But see *Southern Loan Co. v. Morris*, 2 Pa. St. 175.

Warranty of validity.—Thus, the indorser may not set up as a defense that the instrument was made on the Lord's day. *Prescott*

Nat. Bank v. Butler, 157 Mass. 548. Or that it is void as to the maker for usury. Horowitz v. Wollowitz, 59 Misc. (N. Y.) 520. But where the indorser is also the maker, and the contract is void under some statute, as, for example, where it is usurious, the warranty can be no stronger than the contract itself. Sabine v. Paine, 166 App. Div. (N. Y.) 9, 12.

Certificate of deposit.—This section applies to one who indorses in blank a certificate of deposit; and if the paper is dishonored owing to the insolvency of the bank he can be held as indorser. Jensen v. Wilslef, 36 Nev. 37.

Guaranty of indorsements.—The words “indorsements guaranteed” placed upon the back of a check is equivalent to a guaranty of the genuineness of the whole of the instrument, including the indorsements, excepting only the signature of the drawer. N. Y. Produce Exchange Bank v. Twelfth Ward Bank, 135 App. Div. 52.

Where note stipulates for attorney's fee.—An indorser of a promissory note which contains a stipulation for a reasonable attorney's fee in case of suit is as much liable for the attorney's fee as for the principal of the note. Benn v. Kutzschan, 24 Ore. 28. See section 2.

Individual indorsement of partner.—Under the statute a partner who indorses a note made by the firm adds to his liability as maker a further liability as indorser. Nat. Exchange Bank v. Lubrano, 29 R. I. 64; Fourth Nat. Bank v. Mead, 215 Mass. 521.

Indorsement by executors.—Executors have no power to bind the estate of the testator by the contract of indorsement. Packard v. Dunfee, 119 App. Div. (N. Y.) 599; Schmittler v. Simon, 101 N. Y. 554. See also Union Bank v. Sullivan, 214 N. Y. 332, where the indorsement was made by one of several executors.

Holder's knowledge of infirmity.—As the new contract evidenced by the indorsement is not dependent upon the validity of the note, the holder may hold the indorser upon his warranty, even though he knew when he took the note that it was not enforceable against the maker, as, for example, when the note was made by a corporation and was *ultra vires*; First Bank of Notasulga v. Jones, 156 App. Div. (N. Y.) 277; or was made by a married woman. In re Young's Estate, 234 Pa. St. 287.

Requiring holder to sue maker.—The indorser has no right to require the holder to sue the maker or drawer under the penalty of the indorser being discharged in case of non-compliance. *Day v. Ridgway*, 17 Pa. St. 303. See also *Curtis v. Davidson*, 215 N. Y. 395. Nor is the holder bound to anticipate and make provision for a breach of the contract. *Bartlett v. Isbell*, 31 Conn. 297.

Parol evidence.—Parol evidence of an agreement which would vary the legal liability of the indorser under his indorsement is inadmissible. *Smith v. Caro*, 9 Ore. 278; *Eaton v. McMahon*, 42 Wis. 484. And while there has been some conflict in the decisions, the sounder doctrine puts all indorsements on substantially the same footing. The contract by a blank indorsement is fixed by law, and should not be rendered uncertain by parol, any more than when written out in full. *Charles v. Denis*, 42 Wis. 56, 58; *Torbert v. Montague*, 38 Colo. 325. This is the rule adopted in the statute, which makes the indorser's obligation absolute. Thus, the holder may not show by parol that the liability of an indorsing payee is that of a maker. *Burwell v. Gaylord*, 119 Minn. 426. And one who indorses without qualification will not be permitted to show an oral agreement, made at the time, that such indorsement was to be without recourse to him. *Aronson v. Nurenberg*, 218 Mass. 376. See section 68 and note.

Holder's right to choose whom he will sue.—The indorser has no right to require the holder to sue the maker or drawer. *Day v. Ridgway*, 17 Pa. St. 303. And, on the other hand, the maker may not defend upon the ground that as between the indorser and the holder the note has been secured or paid. *People's Nat. Bank v. Rice*, 149 App. Div. (N. Y.) 18.

§ 67. Liability of indorser where paper negotiable by delivery.—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

Rule at common law.—This section makes no change in the law. *Cover v. Meyers*, 75 Md. 406.

Holder's right of election.—The holder of paper payable to bearer and indorsed may sue upon it as bearer or indorser at his

election. Daniel on Negotiable Instruments, section 663a; 3 Kent's Comm. 44.

Negotiation of paper so indorsed.—Formerly in some states a note payable to a designated payee or bearer could not be negotiated except by the indorsement of such person. See *Garvin v. Wiswell*, 83 Ill. 218; *Blackman v. Lehman*, 63 Ala. 547. But by section 40 of the Negotiable Instruments Law an instrument payable to bearer and indorsed specially may be further negotiated by delivery.

§ 68. Order in which indorsers are liable.—As respects one another indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

Variant readings.—In Illinois, for the last sentence of the section, the following is substituted: "All parties jointly liable on a negotiable instrument are deemed to be jointly and severally liable."

Accommodation indorsers.—This rule is general, and applies to accommodation indorsers as well as to others. Such indorsements import, not a joint, but a several and successive, liability, each indorser being responsible to all who succeed him. *Easterly v. Barber*, 66 N. Y. 433; *Kelly v. Burroughs*, 102 N. Y. 93; *Egbert v. Hanson*, 34 Misc. 597; *McCarty v. Roots*, 21 How. (U. S.) 432; *Bank of U. S. v. Beirne*, 1 Gratt. 234; *Hague v. Davis*, 8 Gratt. 4; *Shaw v. Knox*, 98 Mass. 214; *McDonald v. Magruder*, 3 Peters, 470; *Wood v. Repold*, 3 Harris & J. 125; *Clapp v. Rice*, 13 Gray, 403; *Howe v. Merrill*, 15 Cush. 88; *Talcott v. Cogswell*, 3 Day, 512; *Kirschner v. Conklin*, 40 Conn. 77, 81; *Wolf v. Hostetter*, 182 Pa. St. 292; *Russ v. Sadler*, 197 Pa. St. 51; *Bamford v. Boynton*, 200 Mass. 560. The mere fact, then, that indorsers are accommodation parties and known to one another to be such does not overcome the *prima facie* presumption, but for this purpose it is necessary to show a special agreement. In *re McCord*, 174 Fed. Rep. 72.

Proof of special agreement.—See *Morrison Lumber Co. v. Look-out Mt. Hotel Co.*, 92 Tenn. 6; *Bank of Jamaica v. Jefferson*, 92 Tenn. 537; *Reinhart v. Schall*, 69 Md. 352; *Hale v. Danforth*, 46 Wis. 554; *Witherow v. Slaybach*, 158 N. Y. 649; *Patch v. Washburn*, 82 Mass. 82; *Breneman v. Furniss*, 90 Pa. St. 186. Evidence to show an agreement for a joint liability; *Easterly v. Barber*, 60 N. Y. 433; *Phillips v. Preston*, 5 How. (U. S.) 278; *Edelen v. White*, 6 Bush. 408; *contra*, *Johnson v. Ramsay*, 43 N. J. Law, 279. Evidence to show contract that one was to be prior indorser. *Slack v. Kirk*, 67 Pa. St. 380; *Reinhart v. Schall*, 69 Md. 352; *Slagel v. Rust*, 4 Gratt. 274. For a case where relief given in equity where order of indorsers changed on renewal of note without consent of one; see *Slagel v. Rusts' Admr.*, 4 Gratt. 274. The statute has changed the law in New Jersey. *Morgan v. Thompson*, 72 N. J. L. 244, 246.

Agreement inferred from circumstances.—To overcome the *prima facie* presumption created by this section it is not necessary that there shall be proof of an actual formal contract in so many words; but it is sufficient if, taking all the circumstances into account, the nature of the liability appears, which as between themselves the indorsers intended to assume. *Weeks v. Parsons*, 179 Mass. 570, 575; *Clapp v. Rice*, 13 Gray, 403; *Hagerthy v. Phillips*, 83 Me. 336; *MacDonald v. Whitfield*, L. R. 8 App. Cas. 738. Thus, where the members of a stranded theatrical company indorsed a note for the purpose of raising money to enable them to get home, and all were equally benefitted, a prior indorser who had been compelled to pay the note was held to be entitled to contribution from the other indorsers. *George v. Bacon*, 138 App. Div. (N. Y.) 208. So, where the stockholders of a corporation indorsed a note to enable the corporation to continue in business, it was held that they were, as among themselves, equally liable, though there was no proof of an agreement to that effect. *Trego v. Cunningham's Estate*, 267 Ill. 367.

Parol evidence.—Under this section the agreement of the indorsers as to their liability respecting one another may be shown by parol. *Wilson v. Hendee*, 74 N. J. L. 640; *Hunter v. Harris*, 63 Ore. 505; *Noble v. Breemen-Spaulding Co.*, 65 Ore. 93; *Goldman v. Goldberger*, 208 Fed. Rep. 877. Thus, in an action brought by one indorser of a note against one of the two other indorsers, the defendant was allowed to show that the indorsements were for ac-

accommodation, and that by an oral agreement among the indorsers his liability was in no event to exceed one-third of the amount at any time due on the note. *Shea v. Vahey*, 215 Mass. 80. See also *Union Bank v. Sullivan*, 214 N. Y. 332. And the rule which permits the receipt of parol evidence to determine the question of liability as between those who are secondarily liable applies to the drawer of a bill. *Haddock, Blanchard & Co. v. Haddock*, 192 N. Y. 499. In the case last cited the court said: "As we have seen, upon the acceptance of the bill the acceptor becomes the principal debtor and the one primarily liable to pay the amount of the bill, and all other parties to the instrument, including the maker and indorser, are secondarily liable. We are of the opinion that the maker [drawer] of the bill is in legal effect and within the intention of this section an indorser, and that as between the plaintiff and the defendant, parol evidence is authorized to determine the liability as between them."

Joint payee indorsing.—This provision changes the law. Prior to the statute joint payees who indorsed were liable only jointly. *Lane v. Stacy*, 8 Allen, 41; *Daniel on Negotiable Instruments*, section 704.

Suit against one joint indorser.—Under this section, an action lies against one joint indorser without joining the others. *Hodgens v. Jennings*, 148 App. Div. (N. Y.) 879.

§ 69. Liability of agent or broker.—Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

Variant readings.—In Illinois a new section is interpolated at this place as 69a. "Whenever any bill of exchange drawn or indorsed within this state and payable without this state, is duly protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay such bill at the current rate of exchange and with legal interest from the time such bill ought to have been paid until paid, together with the costs and charges of protest,

and on bills payable in the United States in case suit has to be brought thereon and on bills payable without the United States with or without suit, five per cent. damages in addition."

Rule at Common law.—See *Meriden National Bank v. Gallaudet*, 120 N. Y. 289; *Cabot Bank v. Morton*, 4 Gray, 156; *Worthington v. Cowles*, 12 Mass. 30.

ARTICLE VII.**PRESENTMENT FOR PAYMENT.**

Section 70. When presentment necessary—effect of failure to present.

71. Where not payable on demand—where payable on demand.

72. What constitutes a sufficient presentment.

73. Place of presentment.

74. Instrument must be exhibited.

75. Presentment where instrument payable at bank.

76. Where person primarily liable is dead.

77. Presentment to persons liable as partners.

78. Presentment to joint debtors.

79. When presentment not required to charge the drawer.

80. When presentment not required to charge the indorser.

81. When delay in making presentment is excused.

82. When presentment may be dispensed with.

83. When instrument dishonored by non-payment.

84. Right of recourse to parties secondarily liable.

85. Time of maturity.

86. How time computed.

87. Instrument payable at bank—effect of.

88. What constitutes payment in due course.

§ 70. When presentment necessary—effect of failure to present.—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

Variant readings.—In Illinois the words “except in case of bank notes” are interpolated after the words “primarily liable” on the instrument.” In Wisconsin all after the words “primarily liable” in the first sentence to the end of that sentence are omitted. In the New York Statute the words “and has funds there available for that purpose” after the word “maturity” in the first sentence, were interpolated by Laws N. Y. 1898, chap. 336. They seem to be superfluous. It is difficult to see how a man can be able to pay, unless he has the funds with which to make payment. Besides, if taken literally, they impose a condition not deemed necessary by the courts. If, for example, the “special place” where the paper is payable is the office of the maker or acceptor, this provision requires that he have the funds there, and it would not be enough that he have them in bank. The interpolation is not only at variance with the decisions on the subject, but is contrary to good sense, and to the practice of the business world. The change was made without the knowledge of the Commissioners on Uniformity of Laws. It affords a good illustration of the absurdities likely to result from legislative “tinkering.” The same change has been made in Kansas and Ohio.

Liability of maker or acceptor.—The rule was well established that presentment was not necessary to charge the maker or acceptor. See *Wright v. Vermont Ins. Co.*, 164 Mass. 302; *Payson v. Whitcomb*, 15 Pick. 212; *Howard v. Boorman*, 17 Wis. 459; *Rumball v. Ball*, 10 Md. 38; *Frampton v. Coulson*, 1 Wils. 33; *Norton v. Ellam*, 2 M. & W. 461; *Hills v. Place*, 48 N. Y. 520; *Bush v. Gilmore*, 45 App. Div. (N. Y.) 89. And this was so though the paper was by its terms payable “upon demand,” for these

words do not make the demand a condition precedent to a right of action, but import that the debt is due and demandable immediately, or at least that the commencement of a suit therefor is a sufficient demand. *Dominion Trust Co. v. Hildner*, 243 Pa. St. 253; *Swearingen v. Sewickley Dairy Co.*, 198 Pa. St. 68; *Church v. Stevens*, 56 Misc. (N. Y.) 572. The rule is general, and applies though the maker has made the note for accommodation and this is known to the holder. *Hansborough v. Gray*, 3 Gratt. 340. For cases arising under the statute, see *Farmers' Nat. Bank v. Verner*, 192 Mass. 531, 534; *Florence Oil Co. v. First Nat. Bank*, 38 Colo. 119; *Deweese v. Middle States Coal & Iron Co.*, 248 Pa. St. 202.

Paper payable at a particular place.—The rule adopted generally in the United States was that where a note is made payable at a particular bank or other place, or a bill of exchange is drawn or accepted payable in like manner, it is not necessary in order to recover of the maker or acceptor to aver or prove presentment or demand of payment at such place on the day the instrument became due or afterward. The only consequence of a failure to make such presentment is that the maker or acceptor, if he was ready at the time and place to make the payment, may plead the matter in bar of damages and costs. *Hills v. Place*, 48 N. Y. 520, 523; *Parker v. Stroud*, 98 N. Y. 379, 384; *Cox v. National Bank*, 100 U. S. 713; *Wallace v. McConnell*, 13 Peters, 136; *Lazier v. Horan*, 55 Iowa, 77; *Insurance Company v. Wilson*, 29 W. Va. 543; *Lockwood v. Crawford*, 18 Conn. 361; *Bond v. Storrs*, 13 Conn. 416.

Where holder has election.—Where, by the terms of the instrument, the holder has the option to declare the principal sum due upon default in the payment of interest he must prove presentment and notice in order to hold an indorser. *Galbraith v. Shephard*, 43 Wash. 698. See also *Bardsley v. Washington Mill Co.*, 54 Wash. 553.

Place of contract.—Where a draft is drawn in another state, by one residing there, upon a person residing in New York, any legal question in reference to presentation and demand for payment is to be determined by the laws of New York. *Sylvester v. Crohan*, 138 N. Y. 494; *Hibernia Bank v. Lacombe*, 84 N. Y. 367. As to presentment of a bill drawn in New York upon a

person doing business in a foreign country, see *Amsinck v. Rogers*, 189 N. Y. 252.

Where indorser holds security.—The fact that the indorser holds security to indemnify him against loss upon his indorsement does not dispense with the necessity for presentment for payment and notice of dishonor. *First Nat. Bank of Binghamton v. Baker*, 163 App. Div. (N. Y.) 72; *Whitney v. Collins*, 15 R. I. 44.

§ 71. Where not payable on demand—where payable on demand.—Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

Variant readings.—In Nebraska all after the word “ issue ” in the second sentence is omitted. In Vermont the words “ its issue in order to charge the drawer ” are substituted for the words “ last negotiation thereof.”

Changes made by the statute.—This section changed the law of New York, which prior to the statute was, that a promissory note payable on demand with interest was a continuing security, on which an indorser remained liable until an actual demand, and the holder was not chargeable with neglect for omitting to make such demand within any particular time. *Merritt v. Todd*, 23 N. Y. 28; *Pardee v. Fish*, 60 N. Y. 265; *Herrick v. Wolverton*, 41 N. Y. 581; *Wheeler v. Warner*, 47 N. Y. 519; *Crim v. Starkweather*, 88 N. Y. 339; *Parker v. Stroud*, 98 N. Y. 379, 385; *Shutts v. Fingar*, 100 N. Y. 541. The object intended to be accomplished by the statute was to do away with the distinction between notes, or bills, payable on demand, which *Merritt v. Todd* had created, and to leave the question of their reasonable presentment for payment, in order to charge the parties to them, as one for the determination of the court upon the facts. *Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 310. In Connecticut, prior to the Negotiable Instruments Law, promissory notes payable on demand were

required to be presented within four months. Connecticut General Statutes, p. 405. But the later statute restores the rule of the common law as it formerly existed in that state. *Hampton v. Miller*, 78 Conn. 267, 271-272. A similar rule prevailed in Minnesota (Minnesota statutes [1891], section 2104). In Massachusetts and Vermont demand notes were overdue in sixty days. *Merritt v. Jackson*, 181 Mass. 67; *Paine v. Central Vermont R. R. Co.*, 118 U. S. 152. As to a note payable on demand, "with interest semi-annually," see *Hayes v. Werner*, 45 Conn. 252.

Reasonable time—What is.—One of the most difficult questions presented for the decision of a court is, what shall be deemed a reasonable time within which to demand payment of the maker of a note payable on demand, in order to charge the indorser. It depends upon so many circumstances to determine what is a reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another. *Seavor v. Lincoln*, 21 Pick. 267. If the facts are disputed and the testimony conflicting, the question is a mixed one of law and fact, to be decided by the jury, under the instructions of the court, but where the facts are not in dispute the question is one of law. *Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 310; *German Am. Bank v. Mills*, 99 App. Div. (N. Y.) 312; *In re Philpott's Estate*, 151 N. W. Rep. (Iowa) 825; *Guild v. Goldsmith*, 9 Fla. 212.

Decisions under the statute.—Under this section it has been held that a note payable on demand should be treated as due four months after its date. *Frazee v. Phoenix Nat. Bank*, 161 Ky. 175. The court said: "The question is under the terms and the spirit of the act, when should there have been a presentment for payment and notice of dishonor. It is a matter of common knowledge that in the banks of central Kentucky commercial paper is rarely permitted to run longer than four months without renewal. It may be said to be a custom or usage of trade that such paper is ordinarily payable within that time, and being the usage of trade, this note should have been treated as due at least on the 20th day of December, 1908." In Massachusetts it is held, under this section, that in the absence of any evidence to show a usage of trade or business to the contrary, a demand note must be presented within sixty days in order to hold an indorser. *Merritt v. Jackson*, 181 Mass. 67.

Paper overdue.—As by section 7 an instrument negotiated when overdue is payable on demand, the requirement of section 71 is applicable in such cases. In theory paper indorsed when overdue is equivalent to a bill of exchange drawn on the party primarily liable, payable at sight. In this theory the necessity of demand and notice is an essential element; not notice on a given day, as in the case of a maturing note, possible in that case, but impossible in the other, for the day appointed by the former maker and the new acceptor has passed; but notice after the holder has had reasonable time to make the demand on the maker, and has employed that time with diligence. *Tyler v. Young*, 30 Pa. St. 143, 144; *Leidy v. Tammany*, 9 Watts, 353; *Guild v. Goldsmith*, 9 Fla. 212.

Request of indorser.—A note, presented in accordance with the request or assent of the indorser, is, as to him, presented in a reasonable time. *Oley v. Miller*, 74 Conn. 304, 308.

On demand after date.—A note payable "on demand after date" is a demand note, and not one payable on a fixed day, and hence, it need only be presented for payment within a reasonable time. *Schlesinger v. Schultz*, 110 App. Div. (N. Y.) 356.

Demand with tender.—Where a note is payable "on demand and upon security given," the making of a demand accompanied by a tender of the securities is not a condition precedent to the maintenance of an action to recover upon the note, but it is sufficient for the plaintiff to produce and tender the note and the securities upon the trial. *Spencer v. Drake*, 84 App. Div. (N. Y.) 272. As to corporate bonds and coupons, see *Williamsport Gas Co. v. Pinkerton*, 95 Pa. St. 62.

Pleading.—The defense that the paper was not presented within a reasonable time after its issue need not be specially pleaded by an indorser; for, since the obligation of the indorser is conditional upon all the steps having been taken by the holder which the statute has prescribed as to presentment and as to notice of non-payment, the burden is on the holder to prove due and timely presentment. *Commercial Nat. Bank v. Zimmerman*, 185 N. Y. 210. The case last cited overrules *German Am. Bank v. Mills*, 99 App. Div. (N. Y.) 312, 315, where it was held that this section of the Negotiable Instruments Law creates a statute of limita-

tions which must be pleaded. For other cases applying the statute, see *Schlesinger v. Schultz*, 110 App. Div. (N. Y.) 356; *Citizens' Bank v. First Nat. Bank*, 135 Iowa, 685.

Rule where check is negotiated.—The provision of this section, that in the case of a bill presentment may be made within a reasonable time after the last negotiation thereof, applies to the indorser of a check. *Columbian Banking Co. v. Bowen*, 134 Wis. 218. In the case cited the court said: "Keeping in mind that the discharge from liability above referred to because of unreasonable delay after the issuance of a check in presenting it for payment, is of the drawer only, and that this action is against the payee who indorsed the instrument in question without qualification and put it in circulation, we turn to section 1678-1, which provides, as to a bill of exchange payable on demand, which from the foregoing obviously includes a check or draft on a bank of the character of the one in question, 'presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.' From the foregoing it seems plain that, as regards the payee of such an instrument as we have here, who puts the same in circulation with his unqualified indorsement thereon, and all subsequent parties thereto so indorsing the same, presentment for payment is sufficient, as regards their liability, if made within a reasonable time after the last negotiation. A bill of exchange payable on demand, regardless of its character, put in circulation, so long as its circulating character is preserved may be outstanding without impairing the liability of indorsers thereof. Formerly, the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That difficulty was removed, so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment. That is recognized as a radical change in the law as it formerly existed." See also *Singer Manufacturing Co. v. Summers*, 143 N. C. 103; *Citizens' Nat. Bank v. First Nat. Bank*, 135 Iowa, 605; *Plover Savings Bank v. Moodie*, 135 Iowa, 685. In the case last cited it was said: "The checks were negotiated by the appellee to the Des Moines Savings Bank, and under the statute already quoted (Code Supp. 1902, §§ 3060a-71), reasonable time for presentation and demand is to be reckoned from the last negotiation

of the paper. Checks are an almost universal substitute for money. They pass from hand to hand, bank to bank, and city to city, and within reasonable limits, it may be said that no matter how long they remain outstanding, so long as one negotiation promptly follows another and the checks are in fact in circulation the statute requires us to hold that the indorser is not legally prejudiced by the consequent delay in their presentation for payment."

Negotiation to payee's agent.—Where the payee negotiates the check to his own agent the failure of the agent to present the check is the payee's own neglect. *Gordon v. Levine*, 194 Mass. 418.

Certificate of deposit.—This section is applicable to a certificate of deposit payable upon demand, and presentment of such a certificate within a reasonable time after its issue must be made in order to charge an indorser thereon. *Anderson v. First Nat. Bank of Charlton*, 144 Iowa, 251. But in the case of a certificate of deposit there is much reason for saying that the parties do not contemplate an immediate demand of payment, and hence an indorsee may not be held to the same degree of diligence in presenting it for payment as the law requires in other cases. *Lindsel v. McClellan*, 18 Wis. 481.

Discharge of drawer by delay.—As respects discharge of the drawer by delay in making presentment, see section 186 and note.

§ 72. What constitutes a sufficient presentment.—Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

Evidence of authority to make presentment.—The mere possession of a negotiable instrument which is payable to the order of

the payee, and is indorsed by him in blank, or of a negotiable instrument payable to bearer, is in itself sufficient evidence of the right to present it and to demand payment thereof. *Weber v. Orton*, 91 Mo. 680; *Sussex Bank v. Baldwin*, 2 Harr. (N. J.) 487; *Shedd v. Brett*, 1 Pick. 401. And payment to such person will always be valid, unless he is known to the payer to have acquired possession wrongfully. *Daniel on Negotiable Instruments*, section 574. There is no need of a power of attorney or written instrument to constitute one an agent for this purpose. *Shedd v. Brett*, 1 Pick. 401. But the mere possession of an instrument payable to order and not indorsed by the payee is not alone sufficient evidence of the authority of an assumed agent to receive payment. *Doubleday v. Kress*, 50 N. Y. 410. Where a bank holding a note for collection sends it for the same purpose to the bank where it is payable, the latter is authorized to demand payment and give notice of dishonor. *Blakeslee v. Hewitt*, 16 Wis. 341.

Time of day.—Except in cases where the instrument is payable at a bank, the holder has the whole day in which to present the same, the only limitation being that he must present it at a reasonable hour, and this may depend upon the circumstances of the case. *Salt Springs National Bank v. Burton*, 58 N. Y. 430; *Farnsworth v. Allen*, 4 Gray, 453; *Barclay v. Bailey*, 2 Camp. 527; *Wilkins v. Jadis*, 2 B. & Ad. 188. As late as nine o'clock in the evening has been held to be a reasonable hour. *Farnsworth v. Allen*, 4 Gray, 453. But it is only when presentment is at the residence that the time is extended into the hours of rest. If it is payable at the place of business it must be presented during those business hours when such places are customarily open, or, at least, while some one is there competent to give an answer. *Waring v. Betts*, 90 Va. 46, 53. As to when instruments payable at bank must be presented, see section 75.

Presentment by bank.—Presentment by a bank having the paper for collection is sufficient. *Fowler Paper Co. v. Bert Jones S. B. Co.*, 183 Ill. App. 310.

Place of presentment.—As to what is a proper place, see next section.

Presentment to person on premises.—As to this, see *Cromwell v. Hynson*, 2 Camp. 596; *Phillips v. Astberg*, 2 Taunt. 206.

§ 73. Place of presentment.—Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;

2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;

4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

Address of indorser.—For a case applying this section, see *Lankofsky v. Raymond*, 217 Mass. 98.

Paper payable at branch bank.—The words in this section “a place of payment” do not mean an individual, a corporation or an institution, but the place itself; and hence, where paper is made payable at one of several branches maintained by a bank or trust company in the same city or county, it must be presented at that branch, and presentment at the main office will not be sufficient to charge an indorser. *Iron Clad Mfg. Co. v. Sackin*, 129 App. Div. (N. Y.) 555.

Where no place of payment is indicated.—See *Gates v. Beecher*, 60 N. Y. 518, 522; *Holtz v. Boppe*, 37 N. Y. 634. A presentment at the maker’s usual place of business during business hours, there being no one there to answer, is a sufficient demand to charge the indorser; for the maker is bound to have a suitable person there to answer inquiries, and pay his notes, if there demanded. *Baumgardner v. Reeves*, 35 Pa. St. 250; *Wallace v. Crilly*, 46 Wis. 577. And presentment at such place is sufficient, though it be closed, there being no explanation furnished as to why it is closed. *Sulsbacker v. Bank of Charleston*, 86 Tenn. 201. If, however, the party has abandoned his place of business at the maturity of the paper, but has a residence or other place of business in the city, which could be ascertained by reasonable in-

quiry, a presentment at the former place of business would not be sufficient. (*Id.*) The making and dating of a promissory note at a particular place is not equivalent to making it payable there, nor does it supersede the necessity for presentment and demand at the residence or place of business of the maker if it be known, or if by due diligence in making inquiry it could be ascertained. *Oxnard v. Varnum*, 111 Pa. St. 193. But where a bill of exchange is addressed to the drawee at a particular house, and the same is accepted generally by him, the address indicates the place where it is to be presented for payment, and a presentment there is sufficient as against the drawee and indorsers. *Pierce v. Struthers*, 27 Pa. St. 249, 254; *Struthers v. Blake et al.*, 30 Pa. St. 139. Where a note is dated at a particular place, and no other place is designated as that of its negotiation and payment, the presumption is that the maker resides where the note is dated, and that he contemplates payment at that place. *Sasscer v. Stone*, 10 Md. 98; *Ricketts v. Pendleton*, 14 Md. 320; *Nailor v. Bowie*, 3 Md. 251; *Clark v. Seabright*, 135 Pa. St. 173. But this is presumption only, and if he resides elsewhere within the state when the note falls due, and this is known to the holder, demand must be made at the maker's residence or place of business. *Sasscer v. Stone*, 10 Md. 98. When the maker does not reside, and has no place of business, in the state where the note is payable, no demand upon him is necessary in order to charge the indorser. *Ricketts v. Pendleton*, 14 Md. 320. And if the maker absconds, this will generally excuse the demand; but if he changes his residence within the same jurisdiction, the holder must endeavor to find it and make demand there. *Nailor v. Bowie*, 3 Md. 251. But where the maker or acceptor waives presentment at his place of business or residence, presentment elsewhere may be sufficient. *King v. Holmes*, 11 Pa. St. 456; *Parker v. Kellogg*, 158 Mass. 90. For a case applying the statute, see *Bardsley v. Washington Mill Co.*, 54 Wash. 553.

Where person to make payment has removed.—If the maker leaves the state subsequent to the making of the note, presentment at his former place of business or residence is sufficient. *Nailor v. Bowie*, 3 Md. 251.

§ 74. Instrument must be exhibited.—The instrument must be exhibited to the person from whom pay-

ment is demanded, and when it is paid must be delivered up to the party paying it.

Rule at common law.—This section makes no change in the law. See *Ocean Nat. Bank v. Fant*, 50 N. Y. 474, 476; *Smith v. Rockwell*, 2 Hill, 482; *Musson v. Lake*, 4 How. 262; *Freeman v. Boynton*, 7 Mass. 483; *Draper v. Clemens*, 7 Mo. 52.

Reason for the rule.—This is requisite in order that the drawer or acceptor may be able to judge (1) of the genuineness of the instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession upon paying the amount. *Waring v. Betts*, 90 Va. 46, 51.

Where payment refused.—Demand of payment without actual exhibition of the note is sufficient to bind the indorser where the maker does not demand to see the note, but refuses payment on other grounds. *Legg v. Viman*, 165 Mass. 555; *Waring v. Betts*, 90 Va. 46; *Lockwood v. Crawford*, 18 Conn. 361; *Fall River Union Bank v. Willard*, 5 Metcalf, 216.

Tender of collateral security.—Where the note is secured by collaterals the maker is entitled to require that they be delivered with the note; and if he insists upon it, they must be tendered with the note or the demand of payment will not be sufficient. *Ocean Nat. Bank v. Fant*, 50 N. Y. 474.

Certificate of deposit.—The usual words in a certificate of deposit by which it is made payable "upon the return of this certificate properly indorsed," add nothing to its provisions, since there is always an implied obligation that the paper will be returned upon payment. *Thompson v. Farmers' Bank*, 140 N. W. Rep. (Iowa) 877.

Demand over telephone.—As presentment must be made by actual exhibition of the paper, or at least, by some clear indication that the paper is at hand ready to be delivered, a demand over the telephone at the place specified in the instrument is not sufficient. *Gilpin v. Savage*, 201 N. Y. 167.

Request for payment.—An informal request for the payment of a demand note, not intended as a formal presentment, is insufficient. *State of N. Y. Nat. Bank v. Kennedy*, 145 App. Div. (N. Y.) 669.

§ 75. Presentment where instrument payable at bank.—Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

Variant readings.—In Nebraska all after the words “banking hours” is omitted.

Rule at common law.—This section makes no change in the law. See *Salt Springs National Bank v. Burton*, 58 N. Y. 430; *Bank of Syracuse v. Hollister*, 17 N. Y. 46; *Bank of Utica v. Smith*, 18 Johns. 230; *Parker v. Gordon*, 7 East. 387; *Garnett v. Woodcock*, 1 Starkie, 475; *Reed v. Wilson*, 41 N. J. Law, 29; *Waring v. Betts*, 90 Va. 46; *Shepard v. Chamberlain*, 8 Gray, 225.

What are banking hours.—What will constitute banking hours within the meaning of the statute has reference to the general custom of the place where the transaction occurs. *Columbian Banking Co. v. Bowen*, 134 Wis. 218. Thus, where presentment was made to a Chicago bank between three and six o'clock in the afternoon, and it appeared that the business day of the bank continued after the close of clearing-house transactions, so as to enable banks holding paper for collection to present those items which had been refused payment through the clearings, it was held that the presentment satisfied the requirements of the statute. To the same effect, see also *Citizens' Central Bank v. New Amsterdam Nat. Bank*, 128 App. Div. (N. Y.) 554; *Columbia-Knickerbocker Trust Co. v. Miller*, 156 Id. 810; s. c. 215 N. Y. 191.

Where paper is lodged with bank.—When a note is made payable at a bank, it is a sufficient presentment, if the note is actually in the bank at maturity ready to be delivered upon payment. *De La Vergne v. Globe Printing Co.*, 148 Pac. Rep. (Colo.) 922; *Dkymann v. Northridge*, 1 App. Div. (N. Y.) 26; *Hollowell v. Curry*, 41 Pa. St. 322.

Bank custom.—As to bank customs, see *Grand Bank v. Blanchard*, 23 Pick. 305, 306; *Mechanics' Bank v. Merchants' Bank*, 6 Metc. 13, 24; *Boston Bank v. Hodges*, 9 Pick. 420; *People's Bank*

v. Keech, 26 Md. 521. But now that the statute prescribes the rules as to presentment, these matters can no longer be governed by custom; certainly not, if the custom conflicts with the statute.

Where bank has been closed.—Under the statute, paper payable at a bank may be presented there though the bank is closed and in the hands of a receiver, and a demand upon the receiver personally is not necessary. *Schlesinger v. Schultz*, 110 App. Div. (N. Y.) 356. See also *Berg v. Abbott*, 83 Pa. St. 177. But compare *Hutchison v. Crutcher*, 98 Tenn. 421, where it was held that, when a national bank has been placed in the hands of a receiver, paper payable at the bank should be presented at the office of the receiver. See section 73, subdivision 1.

How presentment made.—Where a note is made payable at bank it is sufficient that it be presented there during banking hours, and it need not remain at the bank during all of the day of maturity. *Archuleta v. Johnston*, 53 Colo. 393. But compare *German-Am. Bank v. Millman*, 31 Misc. (N. Y.) 87.

Where name of bank not clearly specified.—Where a note dated at a particular place is payable at "The First National Bank," the place of payment is the First National Bank of that place, and presentment should be made there. *Finch v. Calkins*, 183 Mich. 298. But it has been held that the office of a private banker is not a bank within the terms of a note made payable at "any bank in Boston." *Way v. Butterworth*, 108 Mass. 509.

When suit may be commenced.—The authorities are not agreed upon the point as to the precise time when suit may be brought on a dishonored note payable at a bank, some holding that it cannot be brought until the day after its dishonor, others that it may be brought at any time after the expiration of business hours on the day it is payable, and others still that it may be commenced as soon as payment is refused on that day. *Citizens' Bank v. Lay*, 80 Va. 436, 440; *Church v. Clark*, 21 Pick. 309; *Blackman v. Nearing*, 43 Conn. 60; *Humphreys v. Sutcliffe*, 192 Pa. St. 336; *Hardon v. Dixon*, 77 App. Div. (N. Y.) 241.

Kentucky statute.—The Negotiable Instruments Law repealed the former Kentucky statute which provided that a note to be negotiable should be payable and negotiable at a bank in the state. *Gahren v. Parkersburg Nat. Bank*, 157 Ky. 266.

§ 76. Where person primarily liable is dead.—

Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative if such there be, and if, with the exercise of reasonable diligence, he can be found.

Proof of death.—But there must be competent and legal proof of his death, and that the party upon whom the demand was made was such representative; the statement of these facts in the protest is not *prima facie* proof thereof. *Weems v. Farmers' Bank*, 15 Md. 231.

Evidence as to reasonable diligence.—As to what evidence will justify a finding that the holder could not, with reasonable diligence, make presentment to the administrator of the deceased maker. See *Reed v. Spear*, 107 App. Div. (N. Y.) 144.

Necessity for giving notice.—The fact that the holder is excused from making presentment under this section does not relieve him from the duty of giving notice of dishonor to the indorser. *Reed v. Spear*, 107 App. Div. (N. Y.) 144.

§ 77. Presentment to persons liable as partners.—

Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

Rule at common law.—This section makes no change in the law. See *Gates v. Beecher*, 60 N. Y. 518; *Cayuga County Bank v. Hunt*, 2 Hill, 635; *Crowley v. Barry*, 4 Gill, 194; *Fourth Nat. Bank v. Henschuk*, 52 Mo. 207.

§ 78. Presentment to joint debtors.—Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

Variant readings.—In North Carolina the word “parties” is substituted for “partners.” This is evidently an error in engrossing.

Rule at common law.—This section does not change the law. See *Gates v. Beecher*, 60 N. Y. 518, 523; *Union Bank v. Willis*, 8 Metc. 504; *Arnold v. Dresser*, 8 Allen, 435; *Willis v. Green*, 5 Hill, 232; *Benedict v. Schmieg*, 13 Wash. 476.

Where presentment to all is impracticable.—In some cases presentment to all the parties primarily liable will be impracticable, but such cases are covered by section 82.

Suits where liability is joint and several.—The holder of a joint and several note may sue one maker alone upon one cause of action arising out of the note, and all makers generally upon another such cause of action. *Davis v. Schmidt*, 126 Wis. 461.

§ 79. When presentment not required to charge the drawer.—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

Expectation that paper will be paid.—Presentment is not dispensed with merely because the drawer has no funds in the hands of the drawee. *Life Insurance Company v. Pendleton*, 112 U. S. 708; *Dickens v. Beal*, 10 Pet. 572; *Welch v. B. C. Taylor Mfg. Co.*, 82 Ill. 581; *Kimball v. Bryan*, 56 Iowa, 632; *Kingsley v. Robinson*, 21 Pick. 327. It is sufficient if the drawer had a reasonable expectation that the bill would be paid; or if there was an agreement between him and the drawee that the latter should accept, or a course of dealing between them by which the drawee was accustomed to accept without reference to the state of the mutual account. See cases cited above. Presentment of a check is excused where the making of the check was a fraud upon the part of the drawer, he having no funds in the bank, and no ground for a reasonable expectation that it would be paid. *Beauregard v. Knowlton*, 156 Mass. 395, 396.

§ 80. When presentment not required to charge the indorser.—Presentment for payment is not required in

order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

Variant readings.—In Illinois the words “and he has no reason to expect that the instrument will be paid if presented” are omitted.

Where indorser promises to pay.—Thus, where the note is made for the accommodation of the indorser, and he promises the maker to “take care of it,” presentment and notice of dishonor are not necessary. *Dillon v. Bron*, 150 Pac. Rep. (Kans.) 553. See also *Belch v. Roberts*, 177 S. W. Rep. (Mo. App.) 1062; *Luckenbach v. McDonald*, 184 Fed. Rep. 184.

§ 81. When delay in making presentment is excused.—Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

Rule at common law.—This section makes no change in the law. See *Windham Bank v. Norton*, 22 Conn. 213; *Pier v. Heinrichsoffen*, 67 Mo. 163. In these cases the delay was caused by miscarriage in the mail. See section 105.

Sickness as an excuse.—Sickness of the holder of the note is not an excuse for the failure to present it at the proper time, unless it was not only sudden, but so severe as not only to prevent him from making the presentment and giving notice of non-payment himself, but from employing another person to do it; and then it must be shown that the proper steps were taken as soon as the disability was removed. *Wilson v. Senier*, 14 Wis. 380.

Question of law or fact.—Where the facts are not disputed the question of due diligence is one of law for the court; but if there is a dispute as to the facts, the question is for the jury. *Belden v. Lamb*, 17 Conn. 451.

§ 82. When presentment may be dispensed with.—Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment express or implied.

Reasonable diligence—Burden of proof.—The burden is upon the holder to show that due diligence was used. *Eaton v. McMahon*, 42 Wis. 484.

Duty to inform notary.—It is the duty of a holder to give the notary information as to the residence of the drawer and indorser; and if this is unknown to the holder, he must inquire of those whose names are upon the note or bill as to the residence which he does not know. If there are none such, he must use due diligence to ascertain them. It will not do for the holder to put the note or bill in the hands of the notary at the place where it was drawn without furnishing him any information as to the residence of the maker, or that of the indorser, and then for the notary, without inquiry from him, to return the note without demand or notice. The holder is, of all persons, the one most likely to know the place of residence of those to whom he looks for payment, and due diligence requires that he should give the information to his agent, whom he employs to make demand from the maker and give notice to the indorser; or, if he neglects to do so, that the agent should inquire of him where the parties reside. *Smith v. Fisher*, 24 Pa. St. 222.

Question of law or fact.—When the facts are undisputed, the question of diligence is for the court. *Smith v. Fisher*, 24 Pa. St. 222; *Wheeler v. Field*, 6 Metc. 290.

Insolvency of maker or acceptor.—Presentment is not dispensed with by the insolvency of the maker or acceptor. *Reincke v. Wright*, 93 Wis. 368; *Hawley v. Jette*, 10 Oregon, 31; *Bensonhurst v. Wilby*, 45 Ohio St. 340; *Jackson v. Richards*, 2 Caines, 343; *Armstrong v. Thurston*, 11 Md. 148.

Waiver.—The waiver may be made either during the currency of the note or after its maturity. *Power v. Mitchell*, 7 Wis. 161. And evidence of contemporaneous facts and circumstances, at the

time of the transaction, may be shown in evidence, in order to ascertain whether or not a waiver was intended. *Baumeister v. Kuntz*, 53 Fla. 340. The waiver may be made either verbally or in writing. *Smith v. Lowndale*, 6 Oregon, 78. Nor is it necessary that the waiver should be direct and positive. It may result from implication and usage, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. *Cady v. Bradshaw*, 116 N. Y. 188, 191. The waiver must be clearly established, however, and will not be inferred from doubtful or equivocal acts or language. *Ross v. Hurd*, 71 N. Y. 14; *Worley v. Johnson*, 60 Fla. 295. But any language is sufficient, which is calculated to induce the holder to forbear taking the necessary steps to charge the indorser. *Torbert v. Montague*, 38 Colo. 325; *Moyer & Brothers' Appeal*, 87 Pa. 129; *Boyd v. Bank of Toledo*, 32 Ohio St. 526; *Worley v. Johnson*, 60 Fla. 295. Where the indorser requests the holder to extend the time of payment and promises to let his name remain on the instrument, this will amount to a waiver of presentment and notice of non-payment. *Cady v. Bradshaw*, 116 N. Y. 188, 191, 192. So, a telegram sent to the collecting bank requesting it to pay the note and save protest and draw, in reply to an inquiry made of the firm by such bank, is a sufficient waiver. *Seldner v. Mount Jackson National Bank*, 66 Md. 488. So, where an indorser admits his liability at the time of the maturity of the note and accompanies such admission with an offer to "arrange the matter" with the holders, and thereafter by his conduct shows that he regards himself as liable, and asks for indulgence. *Moyer & Brothers' Appeal*, 87 Pa. St. 129. So, where a note a short time before the day of its maturity, is presented to an indorser, and the latter then promises that if the note is suffered to run he will pay it whenever payment is called for. *Hale v. Danforth*, 46 Wis. 554. So, where, in response to inquiry by the holder, the indorser told him that it would be of no use to call upon the maker. *Barker v. Parker*, 6 Pick. 80. And so, where the president of a corporation who was an indorser upon its note participated in the act which made it impossible for the corporation to pay. *O'Bannon Co. v. Curran*, 129 App. Div. (N. Y.) 96. As to waiver where the maker has transferred all his property to the indorsee, see *Brandt v. Mickle*, 26 Md. 436; *Mechanics' Bank v. Griswold*, 7 Wend. 165; *Moore v. Alexander*, 63 App. Div. (N. Y.) 100; *Brown v. Maffey*, 15 East. 222; *Bond v. Farnham*, 5 Mass. 170. For cases construing waivers see *Parr v. City Trust Company*, 95 Md. 291,

300-301; *Toole v. Crafts*, 193 Mass. 110; *Baumeister v. Kuntz*, 53 Fla. 340.

Statute of Frauds.—An agreement to waive demand and notice is not within the statute of frauds; it is not a new contract, but only a waiver, absolutely or in part, of a condition precedent to liability. *Taunton Bank v. Richardson*, 5 Pick. 436; *Barclay v. Weaver*, 19 Pa. St. 396; *Power v. Mitchell*, 7 Wis. 159, 166.

Consideration.—From the nature of the indorser's contract no new consideration is required to support the waiver given before or after the maturity of the paper. *Burgettstown Nat. Bank v. Nill*, 213 Pa. St. 456.

Pleading.—The facts constituting the waiver must be specifically pleaded. *Galbraith v. Shepard*, 43 Wash. 698. And proof of waiver may not be given under an allegation of due presentment. *Baer v. Hoffman*, 150 App. Div. (N. Y.) 473.

Necessity for waiver of presentment.—As the indorser is liable only upon two distinct conditions, viz.: (1) That due presentment be made and (2) that due notice of dishonor be given, a waiver of the one is not a waiver of the other. *Hall v. Crane*, 213 Mass. 326; *Berkshire Bank v. Jones*, 6 Mass. 524; *Low v. Howard*, 11 Cush. 268, 270; *Baer v. Hoffman*, 150 App. Div. (N. Y.) 473. But see section 111.

§ 83. When instrument dishonored by non-payment.

—The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

§ 84. Right of recourse to parties secondarily liable.

—Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.

Nature of liability.—When the indorser's liability has been fixed by demand and notice of dishonor, he becomes an independ-

ent and principal debtor, and does not stand in the position of a mere surety. *Curtis v. Davidson*, 215 N. Y. 395; *German-American Bank v. Niagara Cycle Co.*, 13 App. Div. (N. Y.) 450; *First Nat. Bank v. Wood*, 71 N. Y. 405, 411.

Where paper secured by collaterals.—Though the holder has received collateral from the maker, the law implies no contract to proceed on the collaterals before suing the indorser. *Buck v. Freehold Bank*, 37 N. J. Law, 307.

Conditional guaranties.—The section does not change the law as to conditional guaranties, as, for example, a guaranty of the collectibility of the instrument, in which case there is no right of recourse against the guarantor until the holder has first made proper effort to collect from the principal debtor, for in such case the terms of the express contract exclude the idea of an intention to incur the liability prescribed by the statute. *Cowles v. Peck*, 55 Conn. 251; *Summers v. Barrett*, 65 Iowa, 292.

§ 85. Time of maturity.—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

Variant readings.—In Rhode Island the words "except sight drafts" are interpolated after the words "every negotiable instrument." In New Hampshire, at the end of the first sentence, the following is added: "except that three days of grace shall be allowed upon a draft or bill of exchange made payable within this commonwealth at sight, unless there is an express stipulation to the contrary." In Colorado the last sentence reads: "Instruments falling due on any day, in any place where any part of such day is a holiday, are to be presented for payment on the next

succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment during reasonable hours on the part of such day which is not a holiday." In Arizona, Kentucky and Wisconsin, the third sentence is omitted, and in Vermont all of the third sentence down to the words "instrument payable on demand." In Iowa a section has been added to the statute as follows: "A demand made on any one of the three days following the day of maturity of the instrument, except on Sunday or a holiday, shall be as effectual as though made on the day on which demand may be made under the provisions of this act, and the provisions of this act as to notice of non-payment, non-acceptance, and as to protest shall be applicable with reference to such demand as though the demand were made in accordance with the terms of this act; but the provisions of this section shall not be construed as authorizing demand on any day after the third day from that on which the instrument falls due according to its face." In Massachusetts the section has been amended to read as follows: "Every negotiable instrument is payable at the time fixed therein without grace, except that three days of grace shall be allowed upon a draft or bill of exchange made payable within this commonwealth at sight, unless there is an express stipulation to the contrary. Where the day of maturity falls upon a Saturday, Sunday or a holiday, the instrument is payable on the next succeeding business day which is not a Saturday. Instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday; provided, however, that no person receiving any check, draft, bill of exchange or promissory note payable on demand, shall be deemed guilty of any neglect or omission of duty, or incur any liability, for not presenting for payment or acceptance or collection such check, draft, bill of exchange or promissory note on a Saturday; provided also, that the same shall be duly presented for payment or acceptance or collection on the next succeeding business day." (Acts, 1910, ch. 417.) In North Carolina the following section is inserted: "All bills of exchange payable within the state, at sight, in which there is an express stipulation to that effect, and not otherwise, shall be entitled to days of grace as the same are allowed by the customs of merchants in foreign bills of exchange payable at the expiration of a certain period after date on sight; provided, that no days of grace shall be allowed on any

bill of exchange, promissory note or draft payable on demand." In Arkansas, Florida, Indiana, Kansas, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, Virginia and Washington the words "or becoming payable" have been interpolated after the words "Instruments falling due" in the third sentence. In the draft of the statute published by the Commissioners on Uniform State Laws, the following note is appended to this section: "The words in brackets [or becoming payable] have been inserted for the sake of clearness. They are found in the New York, Missouri and Virginia Acts. This section having twice used the word 'payable' then uses the words 'falling due.' This has raised doubts in the minds of some where Friday is a legal holiday and paper matures on Friday. These words are inserted to remove any possible doubt. In Crawford on Negotiable Instruments (3d Ed. 1908), 110-1, it is argued that there is no doubt, and that it is unnecessary to insert these words. Properly interpreted, there is no necessity for inserting these words, but as legislation is cheaper than litigation, it is thought wise for those states, which have not yet enacted this Act to insert these words." In Massachusetts and New Hampshire the words interpolated are, "or payable."

§ 86. How time computed.—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

Origin of the section.—This section was adapted from sections 26 and 27 of the New York Statutory Construction Law.

Computation of time.—A note dated November 8th and payable 12 months after date, matures on November 8th of the following year, and a presentment on November 9th is not timely. *Lewy v. Winkelson*, 135 La. 105.

§ 87. Instrument payable at bank—effect of.—Where the instrument is made payable at a bank it is

equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

Variant readings.—In Illinois, Nebraska and South Dakota, this section is omitted. In Missouri, by an amendment made in 1909, the following was added at the end of the section: "But where the instrument is made payable at a fixed or determinable future time, the order to the bank is limited to the day of maturity only." In Minnesota the word "not" is interpolated, so that the section reads "shall not be equivalent," etc.

Rule at common law.—Prior to the statute there was some conflict in the decisions as to the authority of a bank to pay a note or acceptance made payable there. The rule adopted in the statute was sustained by the weight of authority; and is also the rule which is most convenient in practice. It is supported by the following decisions: *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *Commercial Bank v. Hughes*, 17 Wend. 94; *Commercial Nat. Bank v. Henninger*, 105 Pa. St. 496; *Bedford Bank v. Acoarn*, 125 Ind. 582; *Home Nat. Bank v. Newton*, 8 Bradwell, 563; *contra*: *Grissom v. Commercial Bank*, 87 Tenn. 350. In Pennsylvania it was held that where a bank is the holder of a note payable at the banking house, and upon its maturity the maker has a cash deposit in such bank exceeding the amount of the note, which deposit is not specially applicable to a particular purpose, the bank is bound to charge up the amount of the note against the deposit. In such cases the note is in effect a draft on the bank in favor of the holder, and in discharge of the indorser. *German National Bank v. Foreman*, 138 Pa. St. 474, 479; *Commercial National Bank v. Henninger*, 105 Pa. 496. But it was also held in that state that while a bank which has discounted a promissory note may appropriate to the payment of the note funds in its hands belonging to any party to the note, when payment is not made at the time and place named, yet it is not bound to do so as to any party except the makers. *Mechanics' and Traders' Bank v. Seitz*, 150 Pa. St. 632.

Where paper is not lodged with bank.—Where a note is made payable at a bank the maker may tender payment at the bank, and thus avoid default and stop the running of interest; but, if the paper is not lodged there, the fact that it is payable there does

not make the bank the agent of the holder to receive payment. *Stansbury v. Emberg*, 128 Tenn. 104; *Griswold v. Davis*, 125 Tenn. 229. The statute has not changed the law in this respect. *Cheney v. Libby*, 134 U. S. 68; *Hills v. Place*, 48 N. Y. 520; *Adams v. Hackensack*, 44 N. J. L. 638.

Difference between note and check.—This section was intended to settle the vexed question of the bank's authority, without specific directions, to pay the notes and acceptance of its customers made payable at the bank, and it was not meant to assimilate such notes and acceptance to checks in such way as to impose upon the holder the duty of presenting them as required by section 186; but as regards the maker or acceptor the provision of section 70 applies, that presentment for payment is not necessary in order to charge the person primarily liable on the instrument. *Binghamton Pharmacy v. First Nat. Bank*, 131 Tenn. 711. Hence, the maker cannot defend upon the ground that the holder's neglect to present the paper resulted in loss to the maker. *Id.* But in *Baldwin's Bank v. Smith*, 215 N. Y. 76, Miller, J., who wrote the prevailing opinion, said: "It is incumbent on the holder of the paper to secure payment, and loss resulting from his neglect should fall upon him, not on the drawer, who has no further duty to perform. I am unable to perceive why the same reason does not hold good in the case of a note payable at a bank where the maker has funds to meet it at maturity, especially since such a note is by statute made the equivalent of a check. To the extent that he has appropriated his credit, he is not called upon to look after it, but discharges his duty by keeping his account good. None of the cases in this jurisdiction holding that the maker of a note payable at a bank is not exonerated by the holder's failure to present it for payment involved the question of a loss resulting from such failure. I find nothing in any of them except the dictum in the *Indig* case to the effect that the loss in such case falls on the maker." A ruling upon this point, however, was not necessary to the decision of the case, and the observations quoted may be regarded as a mere dictum.

§ 88. What constitutes payment in due course.—Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

Payment before maturity.—Payment before the day is a defense which binds only the party receiving payment and those who stand in his shoes. *Watson v. Wyman*, 161 Mass. 96, 99.

Authority to receive payment—Possession of paper.—It is the duty of the maker or acceptor to require a production of the paper before paying the same and possession is generally the only adequate evidence upon which he has any right to rely. *Loizeaux v. Fremder*, 123 Wis. 193; *Hayden v. Speakman*, 150 Pac. Rep. (N. M.) 292; *Adair v. Lenox*, 15 Oregon, 489. The rule is that if a bill or note be paid at maturity in full, by the acceptor or maker, or other party liable to a person having a legal title in himself by indorsement, and having the custody and possession of the bill ready to surrender, and the party paying has no notice of any defect of title or authority to receive, the payment will be good. But if upon such payment the holder has not the actual possession of the paper ready to be delivered, and does not in fact surrender it, but gives a receipt or other evidence of the payment, and it turns out that the party thus receiving had not a good right and lawful authority to receive and collect the money, but that another person has such right, the payment will not discharge the party paying, but will be a payment in his own wrong. *Wheeler v. Guild*, 20 Pick, 545, 553; *Trustees of the I. I. Funds v. Lewis*, 34 Fla. 424, 428. Concerning this rule, the Supreme Court of Wisconsin said in a recent case: "It is so simple, and, once understood, furnishes so easy and sure a means for both debtor and owner to protect themselves against unauthorized acts of others, that it ought not to be weakened or confused. The holder can always be safe by retaining the instrument in his possession; the debtor, by refusing payment without actual presentation. It is justified in application to negotiable paper distinctively from other property by the very dominant purpose of easy and probable transfer at any moment, so that what may be true as to ownership of such paper on one day is likely to have changed on the next. Of the probability of such change the negotiability of the instrument is a continual warning." *Loizeaux v. Fremder*, 123 Wis. 193, 198. Such rule applies generally to all negotiable paper independently of the existence of any mortgage or other security. *Marling v. Nommensen*, 127 Wis. 363. Payment made to the original holder, after indorsement and delivery of the paper even as collateral security, is no defense to a suit on the note by

the indorsee, although the payment was made by the maker without notice or knowledge of the transfer. *Gosling v. Griffin*, 85 Tenn. 737. But while a person not in the actual possession of negotiable paper is presumed from that fact alone to have no authority to receive payment thereon, yet such presumption may be rebutted and overcome by evidence showing actual authority. *Swengle v. Wells*, 7 Ore. 222. The original payee of a negotiable note in possession thereof, is presumed to be the owner, and has ostensible authority to receive payment, although the note bears the blank indorsement of such payee. *Home Savings Bank v. Stewart*, 78 Neb. 624.

ARTICLE VIII.

NOTICE OF DISHONOR.

- Section** 89. To whom notice of dishonor must be given.
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Section 116. Where notice of non-acceptance has been given.

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118. Protest authorized in all cases of dishonor—when required.

§ 89. To whom notice of dishonor must be given.—Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

Accommodation indorser.—Under the statute an accommodation indorser is entitled to notice of dishonor the same as any other indorser. *Perry v. Taylor*, 148 N. C. 362; *Houser v. Faysoux*, 168 N. C. 1.

Accommodation maker.—The fact that the note was made for accommodation does not entitle the maker to notice of dishonor. *First Nat. Bank v. Williams*, 164 Ky. 143.

Where persons signing on back of paper are joint makers.—If persons whose signatures appear on the back of the paper became parties under an agreement that they are to be equally liable as joint makers, they are not entitled to notice of dishonor. *Mercantile Bank v. Busby*, 120 Tenn. 652. But see note to section 68.

Officers and directors indorsing for accommodation.—That accommodation indorsers of a note made by a corporation are directors of the corporation and constitute a majority of the board does not dispense with the necessity for giving them notice of dishonor. *Houser v. Fayssoux*, 168 N. C. 1.

Where officer of discounting bank is indorser.—Where an officer of a bank is an indorser upon paper held by the bank he is entitled to notice of dishonor, and the failure to give him notice will be a good defense to him when sued upon the paper, unless it was his duty as such officer to give notice of dishonor on behalf of the bank. *First Nat. Bank of Louisville v. Bickel*, 154 Ky. 11; *Frazee v. Phoenix Nat. Bank*, 161 Ky. 175.

Duty of collecting bank.—A bank holding for collection a note which has been dishonored is required to give notice to only its own principal, and he in turn to give notice to his principal, and so on down the line of indorsers. *Gleason v. Thayer*, 87 Conn. 790; *Shea v. Vahey*, 215 Mass. 80.

Burden of proof.—The burden of proving that due notice was given is on the holder. *Marks v. Boone*, 24 Fla. 177.

Where holder has election.—Where a note gives the holder an option to declare the whole sum due upon default in the payment of interest, he must allege and prove presentment and notice of dishonor in order that he may hold an indorser. *Galbraith v. Shepard*, 43 Wash. 698.

Anticipating dishonor.—The cashier of a bank, when informed of an outstanding check, after it had been placed in the mails for transmission to the drawee for payment, stated to the cashier of the bank remitting the check that it would be paid if the drawer had sufficient funds when the check was received, otherwise not: *Held*, that such information did not constitute a dishonor of the check, so as to require the holder to give notice to the indorser before payment had, in fact, been refused on the receipt of the check by the drawee. *Citizens' Bank v. First Nat. Bank*, 135 Iowa, 605.

Guarantors.—The rule as to notice does not apply to guarantors. *Brown v. Curtiss*, 2 N. Y. 225; *Allen v. Rightmere*, 20 Johns. 365; *Breed v. Hillhouse*, 7 Conn. 523; *Roberts v. Hawkins*, 70 Mich. 566; *Hungerford v. O'Brien*, 37 Minn. 306. And proceedings against the maker are necessary only where there is a guaranty of collection. *Brown v. Curtiss*, *supra*.

§ 90. By whom given.—The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

Who may give notice.—It was once held that no party could give a valid notice unless he was the holder at the time. *Tindal*

v. Brown, 1 Term Rep. 167. But this doctrine, after having been followed in other cases (*Ex parte Barclay*, 7 Ves. 597; *Stewart v. Kennett*, 2 Camp. 177), was expressly overruled in the case of *Chapman v. Keane* (3 Adol. & Ellis, 193), in which most of the previous decisions were reviewed. But notice by a stranger is not sufficient. *Lawrence v. Miller*, 16 N. Y. 235, 237; *Chanoine v. Fowler*, 3 Wend. 173; *Brailsford v. Williams*, 15 Md. 151. And a party who has been discharged by laches, and cannot in any event bring an action on the instrument, is deemed a stranger for this purpose. *Harrison v. Ruscoe*, 15 L. J. Exch. 110; 15 M. & W. 231. A drawee who refuses acceptance cannot give notice. *Stan-ton v. Blossom*, 14 Mass. 116.

§ 91. Notice given by agent.—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

Bank as agent of holder.—Banks as agents for collection have authority to receive and transmit notices on behalf of the owners of the paper. *West River Bank v. Taylor*, 34 N. Y. 128, 130; *Colt v. Noble*, 5 Mass. 167; *Haynes v. Birks*, 3 Bor. & Pul. 599; *Robson v. Bennett*, 2 Taunt. 388.

Notary as agent.—An agent in giving notice represents and acts on behalf of his principal, and this, though he may be a notary and act in his official character. *Lawrence v. Miller*, 16 N. Y. 235, 238.

Maker as agent of holder.—While, of course, the maker cannot give notice in his own behalf, he may do so as agent of the holder. *Traders' Nat. Bank v. Jones*, 104 App. Div. (N. Y.) 433. In the case cited a firm executed two promissory notes payable to the order of a member of the firm, which notes were first indorsed by J. and then by the firm, and were delivered before maturity to the plaintiff bank. The notes not being paid at maturity, notice of protest was served upon the firm, and with it, under separate cover, addressed to J in care of the firm, was a notice of protest directed to J, which the firm were requested to forward to him; and the other member of the firm immediately mailed such notice to J. *Held*, that while J was presumptively an accommodation indorser for the firm, and while the firm could not, therefore, in

their own behalf, give him a valid notice of protest, they could do so on behalf of the bank, and as its agents.

Notice on behalf of wrong person.—A notice made out by a notary public and signed by mistake with the name of the maker of the note instead of with his own name, without the authority of the maker, is insufficient. *Cabot Bank v. Warner*, 92 Mass. 522.

§ 92. Effect of notice given on behalf of holder.—Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

Duty of holder.—But the holder is not bound to give notice to any one but his immediate indorser. *West River Bank v. Taylor*, 34 N. Y. 128, 131; *Linn v. Horton*, 17 Wis. 150, 153.

§ 93. Effect where notice is given by party entitled thereto.—Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

§ 94. When agent may give notice.—Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

Undue delay by agent.—If the agent has failed to give notice to his principal in due time, the latter is cut off, though he may thereafter use due diligence in communicating notice to antecedent parties. *Rosson v. Carroll*, 90 Tenn. 90.

Duty of bank receiving paper for collection.—Under this section, a bank which holds paper for collection, properly discharges its duty to its customer by giving him notice of dishonor in time to enable him to give notice to prior parties. *Brill v. Jefferson Bank*, 159 App. Div. (N. Y.) 461.

§ 95. When notice sufficient.—A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

Variant readings.—In Kentucky the word “not” after the word “need” is omitted; and the word “written” substituted for “verbal;” and the words “the notice” after the word “vitiates” in the last sentence, are omitted. In North Carolina, also the words “the notice” are omitted.

Where notice not signed.—See *Bank v. Dibrell*, 91 Tenn. 301; *Spann v. Baltzell*, 1 Fla. 301; *Kilgore v. Bulkley*, 14 Conn. 362; *Tobey v. Lenning*, 14 Pa. St. 483.

Misdescription of instrument.—See *Grayson County Bank v. Elbert*, 143 Ky. 753; *Aiken v. Marine Bank*, 16 Wis. 679. Where the instrument is misdescribed, the fact that there is no other instrument to which the notice could be applied may be shown by extrinsic evidence. *Cayuga County Bank v. Worden*, 6 N. Y. 19. But a notice of protest signed by a notary public, and personally delivered by him to the indorser is not sufficient to charge the latter, where it appears that the notice was addressed to another person than the indorser, and stated that the holder looked to such person for the payment of the note. *Marshall v. Sonneman*, 216 Pa. St. 65. See also *Hermann Lumber Co. v. Bjurstrom*, 74 Misc. (N. Y.) 93.

§ 96. Form of notice.—The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-pay-

ment. It may in all cases be given by delivering it personally or through the mails.

Variant readings.—In Kentucky the words “or merely oral” are omitted.

Form of the notice.—As respects the form of the notice, this section makes no change in the law. See *Second National Bank v. Smith*, 118 Wis. 18; *Sasser v. Farmers’ Bank*, 4 Md. 409; *Brewster v. Arnold*, 1 Wis. 264. A notice which omits an essential feature of the note, or misdescribes it, is an imperfect one, but not necessarily invalid. It is invalid only where it fails to give that particular information which it would have given but for its particular imperfection; and even in case the notice in itself be defective, if, from evidence *aliunde* of the attendant circumstances, it is apparent that the indorser was not deceived or misled as to the identity of the dishonored instrument, he will be charged. *Hodges v. Schuler*, 22 N. Y. 114; *Artisans’ Bank v. Backus*, 36 N. Y. 106; *Gill v. Palmer*, 29 Conn. 57; *Howland v. Adrian*, 29 N. J. Law, 48; *Derham v. Donohue*, 155 Fed. Rep. 385. To make the notice defective the variance must be such as that, under the circumstances of the case, it conveys no sufficient knowledge to the indorser of the identity of the particular instrument which has been dishonored. *Cayuga County Bank v. Worden*, 1 N. Y. 413, 417; *Mills v. Bank of U. S.*, 11 Wheat. 431; *Bank of Alexandria v. Swaim*, 9 Peters, 33. The notice is not necessarily defective because it is silent as to the date and time of payment, *Youngs v. Lee*, 12 N. Y. 551, or fails to state that demand of payment was made, *Mills v. Bank of U. S.*, 11 Wheat. 431, or does not state at whose request it is given, nor who is the owner of the note. *Shed v. Brett*, 1 Pick. 401. The term “protested” when contained in a notice, with the statement that the holder looks to the indorser for indemnity, fairly and necessarily implies that the note or bill has been dishonored. *Brewster v. Arnold*, 1 Wis. 264. A note is well described when its maker, payee, date, amount and time of payment are stated. A printed notice is sufficient, *Cuyler v. Stevens*, 4 Wend. 566; *Bank of Cooperstown v. Woods*, 28 N. Y. 545, and the signature of the notary need not be in writing, but may be printed. *Bank of Cooperstown v. Woods*, 28 N. Y. 561; *Sussex Bank v. Baldwin*, 2 Harr. (N. J.), 487. But a notice which is barely enough to put the indorser upon inquiry is not sufficient.

Cook v. Litchfield, 9 N. Y. 279, 281. It must reasonably apprise the party of the particular paper upon which he is sought to be charged. *Home Insurance Co. v. Greene*, 19 N. Y. 518; *Dodson v. Taylor*, 56 N. J. Law, 11. In the New York case cited the name of the maker was left blank, and it was held that the notice was not sufficient. Notice that a note is unpaid would not necessarily imply that it is dishonored, because the note might remain unpaid, while in fact it may never have been presented to the maker for payment. *Hunter v. Van Bomhorst*, 1 Md. 504, 510. But such notice might be good if the note is payable at a bank. *Id.* If the notice indicates that the paper was presented before due, it is not sufficient. *Etting v. Schuylkill Bank*, 2 Pa. St. 355. The statement that the holder looks for payment to the party to whom notice is sent is not necessary; for this is implied from the fact of giving notice, *Bank of U. S. v. Carneal*, 2 Peters, 543; *Mills v. Bank of U. S.*, 11 Wheat. 431, 436; *Nelson v. First Nat. Bank*, 29 U. S. App. 554; 69 Fed. Rep. 798, 801; 16 C. C. A. 425; *Cowles v. Horton*, 3 Conn. 523. A certificate of deposit dated January 25, 1904, and due January 25, 1905, was duly presented for payment, and payment refused on January 25, 1905; and thereupon a notice of presentment, demand, and dishonor was sent to, and received by, the indorser. The notice was dated January 25, 1904, when it should have been dated January 25, 1905, and it stated that the demand and dishonor were on the day of the date of the notice, that the certificate was dated January 25, 1905, when it was dated January 25, 1904, and it omitted to recite this clause which was in the certificate, "No interest after six months."—*Held*, that the notice sufficiently identified the certificate and notified the indorser of due presentment, demand and dishonor. *Derham v. Donohue*, 155 Fed. Rep. 385. See also *Wilson v. Peck*, 66 Misc. (N. Y.) 179.

Question of law or fact.—Where there is no dispute as to the facts, the question of the sufficiency of the notice is a question of law for the court. *Cayuga County Bank v. Worden*, 6 N. Y. 19.

Personal service.—The provision of this section respecting personal service did not change the rule as it previously existed. Where personal service is relied upon, the evidence must show either actual personal service or an ordinarily intelligent, diligent effort to make personal service upon the indorser either at his place of business during business hours, or at his residence if he

have no place of business; but if he be absent, it is not necessary to call a second time, and the notice may, in that event, be left with any one found in charge, or if there be no one in charge, or no one there, then the giving of notice is deemed to be waived. *American Exchange National Bank v. American Hotel Victoria Co.*, 103 App. Div. (N. Y.) 372, 374.

Service by mail.—The rule of the commercial law was well settled that if the parties resided in the same place the notice must be personal; that is, must be given to the individual or left at his domicile or place of business. *Sheldon v. Benham*, 4 Hill, 129; *Brown v. Bank of Abingdon*, 85 Va. 95; *Boyd's Admr. v. City Savings Bank*, 15 Gratt. 501, 505; *Bell v. Hagerstown Bank*, 7 Gill, 216; *Westfall v. Farwell*, 13 Wis. 504, 509. But the courts were inclined to restrict the general rule, and established many exceptions to it. *Bank of Columbia v. Lawrence*, 1 Peters, 578. In the notes to 1 *American Lead. Cas.* (402) it is said: "It is obvious that the rule requiring personal notice where the parties reside in the same place, has lost its reasonable force and exists only by authority. Instead of undermining it by exceptions that conflict with it in principle and render the subject embarrassing in practice, it would be much better to declare that the rule itself has become obsolete and is abolished." But it cannot properly be said that the rule had become obsolete, having been recognized and acted on in many recent as well as older cases, and having in no case been denied or disregarded. It was, therefore, too firmly established to be abolished by the courts. See *Boyd's Admr. v. City Savings Bank*, 15 Gratt. 501, 505. In New York, service by mail in such cases was authorized by Laws 1857, Chap. 416. For the construction of the former statute of Wisconsin, see *Smith v. Hill*, 6 Wis. 154; *Westfall v. Farwell*, 13 Wis. 504.

Notice over telephone.—As under this section, the notice may be "in writing or merely oral," a notice given over the telephone may be sufficient. *American Nat. Bank v. Nat. Fertilizer Co.*, 125 Tenn. 328.

Certificate of notary.—Where the notary's certificate contains the statement that the indorsers were "duly notified" an indorser, to meet the evidence furnished by the certificate, must show that he received no notice, either personally or through the mails. *Zollner v. Moffitt*, 222 Pa. St. 544.

Kentucky statute.—In Kentucky this section and section 95 were amended so as to require that the notice shall be in writing. *Grayson County Bank v. Elbert*, 143 Ky. 753. As the rule enacted in the other states was well established by numerous decisions, the reason for destroying uniformity, by making this change in the existing law, is difficult to discover.

§ 97. To whom notice may be given.—Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Notice to agent.—See *Fassin v. Hubbard*, 55 N. Y. 465, 471; *Lake Shore National Bank v. Butler Colliery Co.*, 51 Hun, 63, 68. In *Firth v. Thrush*, 8 Barn. & Cress. 387, the opinion was expressed that authority to indorse negotiable paper carried with it authority to receive notice of its dishonor. And in *Persons v. Kruger*, 45 App. Div. 187, it was held that a notice of protest may be served upon an agent of the payee and indorser, where the agent has authority to make and indorse paper, and has authority to act and has acted as the general agent of the payee in the conduct of his business, and has had full charge of the acts and dealings with the bank at which the paper was discounted and the management of the paper. A notice of non-payment sent to the indorser inclosed under seal and delivered by the messenger to one in the employment of the indorser, with directions not to open it, is insufficient. *Paine v. Edsell*, 19 Pa. St. 178.

§ 98. Notice where party is dead.—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

Notice to personal representative.—See *Denninger v. Miller*, 7 App. Div. (N. Y.) 409; *Bank of Port Jefferson v. Darling*, 91 Hun, 236; *Shoenberger's Executor v. Lancaster Savings Institution*, 28 Pa. St. 459; *Dodson v. Taylor*, 56 N. J. Law, 11; *Massachusetts Bank v. Oliver*, 10 Cush. 557; *Merchants' Bank v. Birch*, 17 Johns.

24. See also *Boyd's Admr. v. City Savings Bank*, 15 Gratt. 501; *Smalley v. Wright*, 40 N. J. Law, 471; *Goodnow v. Warren*, 122 Mass. 82; *Bealls v. Peck*, 12 Barb. 245; *Cayuga Co. Bank v. Bennett*, 5 Hill, 236; *Maspero v. Pedesclaux*, 22 La. Ann. 227.

Notice to last residence, etc., of deceased.—See *Goodnow v. Warren*, 122 Mass. 82; *Merchants' Bank v. Birch*, 17 Johns. 25 *Lindeman's Exr. v. Guildin*, 34 Pa. St. 54. The mailing of notice of dishonor to an indorser known to be dead, directed to a post office known to be one at which he had not received his mail while living, is not a good notice of dishonor. *Merchants' Bank of Canada v. Brown*, 86 App. Div. (N. Y.) 599.

§ 99. **Notice to partners.**—Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

Notice to one partner.—See *Hubbard v. Matthews*, 54 N. Y. 43, 50; *Coster v. Thomason*, 19 Ala. 717; *Slocomb v. Lizardi*, 21 La. Ann. 355; *Fourth Nat. Bank v. Henschuh*, 52 Mo. 207; *Seldner v. Mount Jackson Nat. Bank*, 66 Md. 488. But where partners give a promissory note with one of them as maker and the other as indorser, the latter is not liable on his indorsement unless he be duly notified of the dishonor of the note. *Foland v. Boyd*, 23 Pa. St. 476.

§ 100. **Notice to other joint parties.**—Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

Rule of common law.—This section does not change the law. See *Shepard v. Hawley*, 1 Conn. 367; *Boyd v. Orton*, 16 Wis. 495. For the distinction between parties who are partners and joint partners, see *Gates v. Beecher*, 60 N. Y. 518, 526. See also *Willis v. Green*, 5 Hill, 232. But see *Sherer v. Easton Bank*, 33 Pa. St. 134; *Jarnigan v. Stratton*, 95 Tenn. 619. For a case applying the statute, see *Feigenspan v. McDonnell*, 201 Mass. 341.

§ 101. **Notice to bankrupt.**—Where a party has been adjudged a bankrupt or an insolvent, or has made an

assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

Rule at common law.—In *Callahan v. Kentucky Bank*, 82 Ky. 231, it was decided that where the indorser had made a voluntary assignment for the benefit of creditors, notice to the assignee would bind the indorser and his estate. And a similar rule was adopted by the Supreme Court of Tennessee in *American Nat. Bank v. Junk Bros.*, 94 Tenn. 634. On the other hand, the Supreme Court of Ohio, in *House v. Vinton*, 43 Ohio St., 346, by a majority opinion, declined to adopt this rule, making a distinction between an assignee under a voluntary general assignment and an assignee in bankruptcy. In this latter case, however, there is a strong dissenting opinion by two of the judges of that court, in which the soundness of the rule as announced by the Kentucky court is earnestly insisted upon.

§ 102. Time within which notice to be given.—Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

Hour at which notice may be sent.—The holder need not wait until the close of business hours, but may send notice at once. *Bank of Alexandria v. Swan*, 9 Peters, 33; *Lenox v. Roberts*, 2 Wheat. 373; *Ex parte Moline*, 19 Ves. 216; *Whitwell v. Brigham*, 19 Pick. 117; *Coleman v. Carpenter*, 9 Pa. St. 178.

§ 103. Where parties reside in same place.—Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;
2. If given at his residence, it must be given before the usual hours of rest on the day following;

3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

Variant readings.—In Rhode Island, subdivision two reads as follows: "If given at his residence, it must be given before ten o'clock in the evening of the day following."

Notice to place of business.—See *Adams v. Wright*, 14 Wis. 408; *Cayuga County Bank v. Hunt*, 2 Hill, 236; *Marks v. Boone*, 24 Fla. 177; *Bell v. Hagerstown Bank*, 7 Gill, 216; *Daniel on Neg. Insts.*, section 1038. The notice must follow upon the first demand. *Rosson v. Carroll*, 90 Tenn. 90.

Notice at residence.—See *Phelps v. Stocking*, 21 Neb. 444; *Darbishire v. Parker*, 6 East. 8. While service at the place of business must be during business hours, service at the residence is not so regulated. It will be sufficient if made during any of the hours when members of household are attending to their ordinary affairs. *Adams v. Wright*, 14 Wis. 408. If the service is properly made at the place of business or residence, it is immaterial that the party to be notified did not in fact receive the notice. *Adams v. Wright*, 14 Wis. 408.

Notice by mail.—For a case applying this provision of the section, see *Seigel v. Dubinsky*, 56 Misc. (N. Y.) 681.

Notice by telegraph.—Notice of the dishonor of a bank check given by telegraph on the second day following the deposit of the check for collection, and immediately after the depositor received notice of such dishonor is good; for under sections 103 and 104 the bank has until the day following to give notice of the dishonor, and by section 107 the depositor has until the day following receipt of notice to notify antecedent parties. *Jurgens v. Wichmann*, 124 App. Div. (N. Y.) 531.

§ 104. Where parties reside in different places.—Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day

of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

Variant readings.—In Kansas, Nebraska and Ohio, the words “in next preceding paragraph of this section” are substituted for the words “last subdivision.”

By what mail to be sent.—*Sanderson v. Sanderson*, 20 Fla. 292; *Rosson v. Carroll*, 90 Tenn. 90; *Stephenson v. Dickson*, 24 Pa. St. 148; *Whitwell v. Johnson*, 17 Mass. 449. In *Smith v. Poillon*, 87 N. Y. 590, 597, *Earl, J.*, said: “From a careful examination of all these authorities and many others, it is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that notice of dishonor should be given by the next post after dishonor, on the same day, if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places, between which there was a mail, the notice could be posted the next day after the dishonor or notice of dishonor. Some of the authorities hold that the party required to give the notice may have the whole of the next day. Some of them hold that when there are several mails on the next day, it is sufficient to send the notice by any post of that day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be supported by the most authority in this state. What is a practical and convenient mail depends upon circumstances. It may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reasonable application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law.” But see *Burgess v. Vreeland*, 4 Zab. (N. J.) 71; *Winans v. Davis*, 3 Harr. (N. J.) 276. Where the notice has not arrived at as early a date as in the regular course of the mail

it might have come, if started at the proper time, the onus is upon the plaintiff to prove that it was put in the mail at the proper time. *Friend v. Wilkinson*, 9 Gratt. 31.

Where notice not sent by mail.—See *Bank of Columbia v. Lawrence*, 1 Peters, 578; *Jarvis v. St. Croix Mfg. Co.*, 23 Me. 287.

§ 105. Miscarriage in mails—notice deemed to have been given.—Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

Rule at common law.—This section makes no change in the law. See *Windham Bank v. Norton*, 22 Conn. 213; *Pier v. Heinrichsoffen*, 67 Mo. 163; *Bell v. Hagerstown Bank*, 7 Gill. 216; *Sasscer v. Farmers' Bank*, 4 Md. 409; *Cook v. Foraker*, 193 Pa. St. 461. In *Shed v. Brett*, 1 Pick. 401, 410, it was said: "The mail being established by standing laws of the Government for the purpose principally of facilitating the transmission of mercantile correspondence, it being by far the most usual conveyance of letters and generally the most sure as to time, and safe in every other respect, all men who deal in mercantile paper are presumed to assent, and even expect, that such information as they may want will be communicated in this way. And thus the post-office becomes their agent; and if it happens to fail from any unexpected cause, he who made the right use of it by placing his letter there properly directed has done all his duty, and the consequences must fall upon him who has to receive." For cases applying this section, see *Zollner v. Moffitt*, 222 Pa. St. 644; *First Nat. Bank v. Star Watch Case Co.*, 153 N. W. Rep. (Mich.) 722.

Insufficient postage.—If undue delay in giving the notice is caused by insufficient postage, the notice is not good. *First Nat. Bank v. Miller*, 139 Wis. 126. Thus, the notice was held to be ineffective where it was deposited with insufficient postage in the post-office after ordinary business hours and the close of mail on the business day succeeding dishonor, and was not again sent out with sufficient postage until five days after its return by the postal authorities. *Id.*

§ 106. Deposit in post-office—what constitutes.—

Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter-box under the control of the post-office department.

Rule at common law.—The practice authorized by this section was approved in a number of cases. See *Nat. Bank v. Shaw*, 79 Me. 376; *Pearce v. Langfit*, 101 Pa. St. 507; *Johnson v. Brown*, 154 Mass. 105; *Skilbeck v. Garbett*, 7 Q. B. 846. In some cases it had been held that delivery to a letter carrier was sufficient. *Pearce v. Langfit*, 101 Pa. St. 507; *Shoemaker v. Mechanics' Bank*, 59 Pa. St. 79. But it was not deemed wise to adopt this rule in the statute.

Proof of deposit in post-office.—The fact that the notice was deposited with the post-office may be proved like other facts, by either direct or circumstantial evidence. It may be shown by the testimony of the person who deposited it, or by proof of facts from which it may be reasonably inferred that it was so deposited. *Central National Bank v. Stoddard*, 83 Conn. 332. In an action against an indorser, evidence tending to show that he did not receive notice of dishonor is competent upon the question as to whether notice was ever mailed to him, and the exclusion of such evidence is error. *Union Bank v. Deshel*, 139 App. Div. (N. Y.) 217.

Presumption as to delivery.—A notice placed in a mail chute under the control of the post-office department in the city of New York on the day of protest and postmarked the following day at noon will be presumed, in the absence of evidence to the contrary, to have been delivered before the close of business on that day, as required by section 103. *Wilson v. Peck*, 66 Misc. (N. Y.) 179.

§ 107. Notice to antecedent parties—time of.—

Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

Rule at common law.—This section does not change the law. See *Howland v. Adrian*, 29 N. J. Law, 41; *Howard v. Ives*, 1 Hill, 263; *Jameson v. Swinton*, 2 Taunt. 224; *Shelburne Falls National Bank v. Townsley*, 102 Mass. 177; *Seaton v. Scovill*, 18 Kans. 435; *Haly v. Brown*, 5 Pa. St. 178; *Etting v. Schuylkill Bank*, 2 Pa. St. 355; *Struthers v. Blake*, 30 Pa. St. 139; *Bray v. Hadwen*, 5 Maule & Sel. 68; *Linn v. Horton*, 17 Wis. 150.

Notice to immediate indorser.—If the holder of an indorsed bill or note chooses to rely upon the responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party; and if such notice be properly given in time, by the other parties, it will enure to the benefit of the holder and he may recover thereon against any of them. Thus, if the holder notifies the sixth indorser, and he the fifth, and so on to the first, the latter will be liable to all the parties. And it is no objection to such notice that it is not in fact received by the first or any prior indorser, as soon as if it had been transmitted directly by the holder or notary, provided it has been seasonably sent by each indorser as he received it. *Colt v. Noble*, 5 Mass. 167; *Mead v. Engs*, 5 Cow. 303; *Howard v. Ives*, 1 Hill, 263.

Degree of diligence required.—The same degree of diligence must be exercised on the part of the indorser in forwarding notice as is required of the holder. Ordinary diligence must be used in both cases. He is not bound to forward notice on the very day upon which he receives it, but may wait until the next. See cases above cited. See also *Williams v. Paintsville Nat. Bank*, 143 Ky. 786. The holder of a check indorsed and deposited the same in his bank for collection on July 28th. On July 29th, he was notified by the bank that the check had been dishonored, and on July 30th, he notified the payee by telegraph: *Held*, that the notice was in due time under this section. *Jurgens v. Wichmann*, 124 App. Div. (N. Y.) 531.

Bank holding paper for collection.—A bank holding for collection a note which has been dishonored, is required to give notice to only its own principal, and he in turn to give notice to his principal, and so on down the line of indorsers. *Gleason v. Thayer*, 87 Conn. 248; *Shea v. Vahey*, 215 Mass. 80.

Where indorser is liable for only part of debt.—The application of this section is not confined to those who are antecedent in

liability as to the whole of the debt, but it applies as to all who are antecedent as to any part of it. *Williams v. Paintsville Nat. Bank*, 143 Ky. 786.

§ 108. Where notice must be sent.—Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or

2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

Where address is added to signature.—See *Bartlett v. Robinson*, 39 N. Y. 187. In this case the indorsement was in the following form: "Chas. Robinson, 214 E. 18th Street." The notice of dishonor sent through the post-office was addressed "Chas. Robinson, Esq., City of New York," and was not received by the indorser. *Held*, that he was discharged. For cases applying the statute, see *Archuleta v. Johnston*, 53 Colo. 393; *Century Bank v. Breitbart*, 89 Misc. (N. Y.) 308.

Nearest post-office.—See *Bank of Columbia v. Lawrence*, 1 Peters, 578; *National Bank v. Cade*, 73 Mich. 449; *Northwestern Coal Co. v. Bowman*, 69 Iowa 150; *Mercer v. Lancaster*, 5 Pa. St. 160; *Woods v. Neeld*, 44 Pa. St. 86; *Haly v. Brown*, 5 Pa. St. 178; *Rand v. Reynolds*, 2 Gratt, 171. But if sufficient inquiries have been made, and information received on which the holder has a right to rely, a mistake as to the nearest or usual post-office does not release the indorser. *Moore v. Hardcastle*, 11 Md. 486. For a

case where the indorser received his mail at two post-offices, see *Shelburne Falls Nat. Bank v. Townsley*, 107 Mass. 444. A notice addressed to the indorser at "New York" is insufficient where there is no evidence that he lived, ever had lived, or was sojourning in New York, and no inquiry was made to ascertain whether such was the fact. *Fonseca v. Hartman*, 84 N. Y. Supp. 131. See also *Dupont de Nemour Powder Co. v. Rooney*, 63 Misc. (N. Y.) 344.

Where place of residence and business are different.—*Bank of U. S. v. Carneal*, 2 Peters, 549; *Williams v. Bank of U. S.*, 2 Peters, 96; *Montgomery Co. Bank v. Marsh*, 7 N. Y. 481. The rule that notice might be served at the place of business, as well as at the residence, was not changed by the former statute of Wisconsin, Laws 1861, Ch. 79. *Simus v. Larkin*, 19 Wis. 390.

Place of sojourn.—*Chouteau v. Webster*, 6 Metc. 1; *Young v. Durgin*, 15 Gray, 264; *Bigley's Adm'r v. Cluff*, 16 Gratt. 284, 291-292. The stability of residence acquired under laws relating to taxation and the settlement of paupers is not necessary when ascertaining the abode of an indorser for the purpose of giving him notice of dishonor by mail. He may have a residence for this purpose at two places at the same time, and, in such case, notice to him at either place will be sufficient. *Lowell Trust Company v. Pratt*, 183 Mass. 379, 381.

Where notice is misdirected.—A notice addressed on its face, by mistake, to the maker instead of the indorsee, but inclosed in an envelope properly addressed to the indorsee, and received by him, is sufficient. *Wilson v. Peck*, 66 Misc. (N. Y.) 179.

Where notice is actually received.—Although the residence or place of business is the usual and proper place for giving notice, it will be good if actually given anywhere. *Dickens v. Hall*, 87 Pa. St. 379, 380. If the party to be charged receives the notice in due time he cannot object to the means employed. *Terbell v. Jones*, 15 Wis. 235; *Whitford v. Burekmeyer*, 1 Gill, 127. But if the holder employs other means than the mail he does so at his own risk. *Id.* Notice sent by telegraph, for example, would be sufficient if actually received, and an omission to post the notice in due season might be corrected in this way. *Jurgens v. Wickman*, 124 App. Div. (N. Y.) 531. Or in such case, notice might be

given by telephone. *American Nat. Bank v. Fertilizer Co.*, 125 Tenn. 328.

§ 109. **Waiver of notice.**—Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

Rule at common law.—The statute has not changed the law respecting waiver. *First Nat. Bank v. Gridley*, 112 App. Div. (N. Y.) 398; *Robinson v. Barnett*, 19 Fla. 670. It was well settled that if an indorser with full knowledge of the laches of the holder in neglecting to protest a bill or note, unequivocally assents to continue his liability, or to be responsible, as though due protest had been made, he is held to have waived the right to object, and will stand in the same position as if he had been regularly charged by presentment, demand and notice.

How assent established.—The assent must be clearly established, and will not be inferred from doubtful or equivocal acts or language. It has been frequently held that a promise by the indorser to pay the note or bill, after he has been discharged by the failure to protest it, will bind the indorser, provided he had full knowledge of the laches when the promise was made. A promise made under those circumstances affords the clearest evidence that the indorser does not intend to take advantage of the laches of the holder; and the law, without any new consideration moving between the parties, gives effect to the promise. The assent of the indorser to be bound, notwithstanding he has not been duly charged, may be established by any transaction between him and the holder, which clearly indicates this purpose and intention. *Ross v. Hurd*, 71 N. Y. 14, 18; *Turnbull v. Maddux*, 68 Md. 579; *Lewis v. Brehme*, 33 Md. 412; *Bank v. Dibblell*, 91 Tenn. 301; *Low v. Howard*, 10 Cush. 159; *Smith v. Lownsdale*, 6 Oregon, 78; *Whittaker v. Morrison*, 1 Fla. 25.

Knowledge of facts.—It must appear that the indorser had knowledge of the fact that the holder was in default. *Thornton v. Wynn*, 12 Wheat. 183; *Hunter v. Hook*, 64 Barb. 469; *Nevins v. Moore*, 221 Mo. 331; *Gawtry v. Doane*, 48 Barb. 148; *Schierl v. Baumel*, 75 Wis. 75; *Glaser v. Rounds*, 16 R. I. 235; *Aebi v. Bank*

of Evansville, 124 Wis. 73, 81. And in Massachusetts it is held that knowledge on the part of an indorser that demand upon the maker has not been made is material, and must be proved, notwithstanding the fact that he knew that the note had not been paid, and that notice of non-payment had not been given, and was aware that he was discharged from all liability. *Parks v. Smith*, 155 Mass. 26, 33; *Garland v. Salem Bank*, 9 Mass. 408; *Low v. Howard*, 10 Cush. 159; *S. C.*, 11 Cush. 268; *Kelley v. Brown*, 5 Gray, 108.

Mistake of law.—But where the indorser is fully apprised of the facts, he is bound by the waiver, though made in ignorance of its legal effect. *Toole v. Crafts*, 193 Mass. 110.

Implied waiver.—See *Jenkins v. White*, 147 Pa. St. 303.

Evidence of waiver.—A waiver will not be presumed without the most satisfactory proof. *Lockwood v. Crawford*, 18 Conn. 374. But it is not essential that the waiver be in writing. When the fact is established by competent evidence, a parol waiver is as valid and binding as a written one. The only difference is in the character of the proof. *Annville National Bank v. Kettering*, 106 Pa. St. 531, 534.

Part payment by indorser.—A part payment of a note by an indorser, not explained or qualified by any accompanying circumstances, will be held to be sufficient evidence of waiver of notice. *Whittaker v. Morrison*, 1 Fla. 25.

Where indorser has taken security.—The fact that the indorser holds security to indemnify him against loss upon his indorsement does not dispense with the necessity for notice. *First Nat. Bank of Binghamton v. Baker*, 163 App. Div. (N. Y.) 72; *Moore v. Alexander*, 63 Id. 100; *Whitney v. Collins*, 15 R. I. 44. But see *Brown v. Maffey*, 15 East. 222; *Bond v. Farnham*, 5 Mass. 170; *Haskell v. Boardman*, 8 Allen, 38; *Smith v. Lownsdale*, 6 Ore. 78.

Question for jury.—As to when question of waiver is for the jury, see *Valley Nat. Bank v. Uhler*, 191 Pa. St. 365; *Jones v. Roberts*, 191 Pa. St. 152.

Pleading.—The facts constituting the waiver must be alleged in the pleading. *Congress Brewing Co. v. Habenicht*, 83 App. Div. (N. Y.) 141.

When demand is waived.—As the conditions upon which an indorser is liable, viz., (1) that there shall be demand upon the party primarily liable, and (2) that if the paper be dishonored due notice be given to the indorser, are distinct and independent of each other, a waiver of demand is not a waiver of notice of dishonor. *Hall v. Crane*, 213 Mass. 326. But see *Baumeister v. Kuntz*, 53 Fla. 340; *Dye v. Scott*, 35 Ohio St. 194.

§ 110. Parties affected by waiver.—Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

Waiver in body of instrument.—See *Phillips v. Dipbo*, 93 Iowa, 35; *Smith v. Pickham*, 8 Tex. Civ. App. 326; *Bryant v. Merchants' Bank*, 8 Bush. 43; *Lowry v. Steele*, 27 Ind. 168; *Farmers' Bank of Kentucky v. Ewing*, 78 Ky. 264; *Bryant v. Taylor*, 19 Minn. 396. A waiver inserted in the body of the paper becomes a part of the contract of the indorser as well as of the maker. *Owensboro Savings Bank v. Haynes*, 143 Ky. 534.

Waiver written above signature.—*Woodman v. Thurston*, 8 Cush. 157; *Farmers' Bank v. Ewing*, 78 Ky. 264.

§ 111. Waiver of protest.—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

Reason for the rule.—While in a strict and technical sense the term protest when used in reference to commercial paper means only the formal declaration drawn up and signed by a notary, yet in a popular sense, and as used among men of business, it includes all the steps necessary to charge an indorser; and in waiving protest an indorser is supposed to use in it this sense. *Coddington v. Davis*, 1 N. Y. 186, 189-190; *Annvile Nat. Bank v. Kettering*, 106 Pa. St. 531; *First Nat. Bank v. Schreiner*, 110 Pa. St. 188; *Continent Life Ins. Co. v. Barber*, 50 Conn. 567; *First Nat. Bank v. Falkenham*, 94 Cal. 141; *Brewster v. Arnold*, 1 Wis. 264; *Wilkie v.*

Chandon, 1 Wash. 355. For cases applying this section, see *Bell-Knox Coal Co. v. Gregory*, 152 Ky. 413; *Bank of Montpelier v. Montpelier Lumber Co.*, 16 Idaho, 730.

Extent of waiver.—But the waiver will not be extended beyond the fair import of the terms; and hence, a waiver of “notice of protest” will not be deemed a waiver of demand. *Sprague v. Fletcher*, 8 Oregon, 367.

Pleading.—In construing a pleading a more technical rule will be applied, and an allegation that the instrument was duly protested will not be held to comprehend an averment that notice of dishonor was given to the indorser. *Cook v. Warren*, 88 N. Y. 37. *Contra*, *Gleason v. Thayer*, 87 Conn. 248. And it has been held that an averment in an affidavit of defense that the note sued on was not protested, or notice of protest given, is not sufficient, for the note may have been presented and notice of nonpayment given without any formal protest having been made. *First Nat. Bank v. Tustin*, 246 Pa. 151.

§ 112. When notice is dispensed with.—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

Where principal obligor is dead.—The fact that the holder is excused from making presentment for payment under section 76 because the principal obligor is dead, does not relieve him from the duty of giving notice of dishonor to the indorser. *Reed v. Spear*, 107 App. Div. (N. Y.) 144.

Reasonable diligence.—See *Hobbs v. Straine*, 149 Mass. 212; *Staylor v. Ball*, 24 Md. 183; *Reed v. Spear*, 107 App. Div. (N. Y.) 144; *Fonseca v. Hartman*, 84 N. Y. Supp. 131; *Siegel v. Dubinsky*, 56 Misc. (N. Y.) 681. Reasonable diligence is all that is required. The law does not exact every possible exertion which might have been made to effect notice of the dishonor of the paper. *Bank of Port Jefferson v. Darling*, 91 Hun, 236. But, as said by Lord Ellenborough, the holder cannot allow himself to remain “in a state of passive and contented ignorance.” *Bateman v. Joseph*, 2 Campb. 461. What is reasonable diligence will depend upon the circumstances of each case. What would be sufficient in one case might

fall short in another. *Howland v. Adrian*, 29 N. J. Law, 41. And any mode of inquiry will be sufficient which under the circumstances of the case evinces reasonable diligence. *Hartford Bank v. Stedman*, 3 Conn. 494.

Reliance upon directory.—But bare reliance upon a directory is not sufficient. *Bacon v. Hanna*, 137 N. Y. 379, 382. In the case last cited, the court said: "Merely looking into a directory is not enough. The sources of error in that process are too many and too great. Such books are accurate enough in a general way, and convenient as an aid or assistance, but they are private ventures, created by irresponsible parties, and depending upon information gathered as cheaply as possible and by unknown agents. Their help may be invoked, but, as was said in *Lawrence v. Miller*, 16 N. Y. 235, their error may excuse the notary, but will not charge the defendant. Merely consulting them should not be deemed 'the best information obtainable by diligent inquiry.'" *Greenwich Bank v. DeGroot*, 7 Hun, 210; *Baer v. Leppert*, 12 Hun, 516."

Duty to apply for information.—If the holder is ignorant of the address he should apply to the other parties to the instrument for information. *University Press v. Williams*, 48 App. Div. (N. Y.) 190.

Duty to inform notary—Duty of notary to inquire.—When a notary is employed, it is the duty of the holder to inform him of the indorser's place of residence; and if this be omitted, the notary ought to apply to all the parties to the instrument for information, and especially to the holder himself. *Hill v. Farrell*, 3 Greenleaf, 233; *Haly v. Brown*, 5 Pa. St. 178, 182; *Tate v. Sullivan*, 30 Md. 464; *Staylor v. Ball & Williams*, 24 Md. 183.

Agent for collection.—But as the duty to give notice, and therefore the duty of due diligence to discover the residence of the indorser, arises subsequently to the dishonor of the note, it is not an element of due diligence that the owner should previously have communicated his knowledge of the indorser's residence to the holder for collection. *Bartlett v. Isbell*, 31 Conn. 297.

Change of residence—Presumption.—Where it does not appear that the residence of the indorser has been changed previously to the time of sending the notice, it will be presumed that there has

been no change of residence up to that time. *Mohlman Co. v. McKane*, 60 App. Div. 546 (a case arising under the statute).

When question of law.—Where the facts are undisputed the question of due diligence in seeking to give notice of dishonor is for the court. *Haly v. Brown*, 5 Pa. St. 178.

§ 113. When delay in giving notice is excused.—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Illustration.—For example, in *Martin v. Ingersoll*, 8 Pick. 1, the delay was caused by the fact that during the Christmas holidays vessels were not allowed to clear from Havana: *Held*, that during the continuance of the holidays it was not necessary to write a notice of the dishonor of a bill.

§ 114. When notice need not be given to drawer.—Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person;
2. Where the drawee is a fictitious person or a person not having capacity to contract;
3. Where the drawer is the person to whom the instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
5. Where the drawer has countermanded payment.

Where drawer and drawee are the same person.—See *Roach v. Ostler*, 1 Man. & Ry. 120; *Planters' Bank v. Evans*, 36 Tex. 592; *Chicago, etc., R. R. Co. v. West*, 37 Ind. 211. When the drawer and the drawee are the same in contemplation of law, the rule applicable to such draft is, that in legal operation it is regarded as a

promissory note, payable on demand, and the maker thereof is not entitled to notice. *Bailey v. Southwestern R. R. Bank*, 11 Fla. 266. Notice is not required to render a firm liable where all the members of the firm are members of the house which drew the bill. *West Branch Bank v. Fulner*, 3 Pa. St. 399.

Right to expect paper to be honored.—*Life Insurance Company v. Pendleton*, 112 U. S. 708; *Wollenweber v. Ketterlinn*, 17 Pa. St. 389. Although the drawer has no funds in the hands of the drawee, yet if he has a right to expect to have funds there to meet the bill, or if he has a right to expect the bill to be accepted by the drawee in consequence of an agreement or an arrangement with him, or if upon taking up the bill he would be entitled to sue the drawee or any other party to the bill, then in every such case he is entitled to strict notice of dishonor. *Pitts v. Jones*, 9 Fla. 519.

§ 115. When notice need not be given to indorser.—Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation.

Where drawee is a fictitious person.—See note to section 9.

Where instrument is presented to indorser.—For cases applying the statute, see *Electric Mfg. Co. v. Hodge*, 181 Mo. App. 232; *In re Swift*, 106 Fed. Rep. 65.

Paper made or accepted for indorser's accommodation.—See *French v. Bank of Columbia*, 4 Cranch, 141; *Ross v. Bedell*, 5 Duer, 462; *Blenderman v. Price*, 50 N. J. L. 296; *Torrey v. Frost*, 40 Me. 74. Where one, as indorser, procures the note of another to be discounted by a bank for his credit, and at the time the discount is effected makes a distinct promise to the bank to pay the note at maturity, his liability is absolute, not conditional, and protest and

notice of non-payment are unnecessary. *Sieger v. Second National Bank*, 132 Pa. St. 307. So, where a number of stockholders indorse before delivery, a note made for the benefit of the corporation, the note may be regarded as made for their accommodation, so that notice of dishonor is excused under that provision of the Negotiable Instruments Law, which dispenses with notice where the instrument was made or accepted for the indorsers' accommodation. *Mercantile Bank v. Busby*, 120 Tenn. 652. Defendants were respectively president and secretary of a corporation and also directors and large stockholders. The corporation had no assets whatever from which it could realize money, but was engaged in the execution of two contracts, which defendants regarded as valuable. For the purpose of continuing with performance of the contracts, they borrowed money from plaintiff's testator, giving a note which they signed on behalf of the corporation, and which with another director, they also indorsed individually. When the note matured, the company had no money with which to pay it, as defendants, its executive officers knew: *Held*, that under this section, the holder was not required to present the note to the company for payment, or to give the defendants notice of dishonor. *Luckenbach v. McDonald*, 164 Fed. Rep. 296, 95 C. C. A. 604.

§ 116. Where notice of non-acceptance has been given.—Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

See *De la Torre v. Barclay*, 1 Stark, 308; *Campbell v. French*, 6 T. R. 200.

§ 117. Omission to give notice of non-acceptance—subsequent holder.—An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

Variant readings.—In Wisconsin the following is added at the end of the section: "but this shall not be construed to relieve any liability discharged by such omission." This amendment is harmless; but the necessity for it would be difficult to discover.

§ 118. Protest authorized in all cases of dishonor—when required.—Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.

Variant readings.—In Vermont the following is added at the end of the section: “but this provision shall not be held to dispense with demand and notice of dishonor as provided by §§ 71 and 90.”

Rule at common law.—This section makes no change in the law. See *Bay v. Church*, 15 Conn. 129; *Legg v. Vinal*, 165 Mass. 555; *Tate v. Sullivan*, 30 Md. 464; *Weems v. Farmers' Bank*, 15 Md. 231; *Ricketts v. Pendleton*, 14 Md. 320; *Sumner v. Kimball*, 2 Wis. 524; *Stephenson v. Dickson*, 24 Pa. St. 148. Under this section the drawer of a foreign bill is discharged unless the bill be protested. *Amsinck v. Rogers*, 189 N. Y. 252; S. C., 103 App. Div. 428.

Certificate of notary.—While protest is not necessary, except in case of foreign bills, it is very convenient in all cases, because it affords the easiest and most certain method of proving the fact of dishonor and the notice to the indorsers. The statutes of nearly all, if not all, of the states make the certificate of the notary *prima facie* evidence of these facts. Under the statute of Pennsylvania, making the certificate of a notary public evidence of the facts therein contained, a notary's certificate that he had protested a note, and notified the endorsers of the presentation, demand and refusal, is *prima facie* evidence that notice was given in compliance with the requirements of the Negotiable Instruments Law. *Scott v. Brown*, 240 Pa. St. 328.

Foreign bills.—As to what are foreign bills, see section 129. For other provisions relative to protest, see sections 152-160.

Protest of notes not required.—Statute applied in *Demelman v. Brazier*, 198 Mass. 458; *Sherman v. Ecker*, 59 Misc. (N. Y.) 216; *McBride v. Illinois Nat. Bank*, 138 App. Div. (N. Y.) 346.

ARTICLE IX.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

Section 119. How instrument discharged.

- 120. When person secondarily liable is discharged.
- 121. Payment by person secondarily liable—effect of.
- 122. Renunciation by holder.
- 123. Unintentional cancellation.
- 124. Alteration of instrument—effect of.
- 125. What constitutes a material alteration.

§ 119. How instrument discharged.—A negotiable instrument is discharged:

- 1. By payment in due course by or on behalf of the principal debtor;
- 2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
- 3. By the intentional cancellation thereof by the holder;
- 4. By any other act which will discharge a simple contract for the payment of money;
- 5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

Variant readings.—In Illinois subdivision four is omitted.

Stamping paper "paid."—The mere fact that the payee stamps the word "paid" upon the paper does not constitute payment. *Hanna v. McCrory*, 141 Pac. Rep. (N. Mex.) 996.

Forged paper.—As to the effect of payment made by a drawee where the drawer's signature is forged, see note to section 62.

Payment by stranger.—When one who is not a party to the paper pays his money for it, and "takes it up," the presumption is that he has bought it, and not paid it off. *Cantrell v. Davidson*, 180 Mo. App. 410.

Possession as evidence of payment.—The possession of a bill of exchange by the acceptor after it has been in circulation is *prima facie* evidence that it has been paid by him. *Baring v. Clark*, 19 Pick. 220. So the possession of a promissory note by the maker. *First Nat. Bank v. Harris*, 7 Wash. 139; *Perez v. Bank of Key West*, 36 Fla. 467. But see *Miller v. Kreiter*, 76 Pa. St. 75; *Eckert v. Cameron*, 7 Wright, 120; *Korkemas v. Macksoud*, 131 App. Div. (N. Y.) 728.

Where renewal note is a forgery.—The surrender of a genuine note of a town in exchange for an instrument purporting to be a renewal note forged by the treasurer of the town does not extinguish the surrendered note, which, although not to be found, can be sued upon by the holder. *Bass v. Inhabitants of Wellesley*, 192 Mass. 526.

Burden of proof.—Where the defendant admits the execution of a note, the burden of showing payment is on him. *Guano Company v. Marks*, 135 N. C. 59; *Swan v. Carawan*, 168 N. C. 472.

Payment by indorser.—A payment made to the holder of a promissory note by an indorser, not as agent for the maker, but simply in discharge of his obligation as indorser, where the note was executed by the maker for value, does not enure to the benefit of the latter, and in an action upon the note he is liable for the whole amount thereof, notwithstanding the payment. *Madison Square Bank v. Pierce*, 137 N. Y. 444. In the case cited it was said: "To the extent of the money paid, the indorser becomes equitably entitled to be substituted to the rights and remedies of the holder, and becomes, *pro tanto*, the beneficial owner of the debt; so that the maker's obligation to pay the note in full, at first due the holder solely in his own right, becomes, after the part payment by the indorser, still wholly due to the holder, but partly in his own right and partly as trustee for the indorser. A court of law cannot split the note into parts, and must act upon the legal interest and owner-

ship." For cases where payment made by person secondarily liable, see section 121.

Accommodation paper.—Where a note is made for the accommodation of one of the makers, and is paid by him, it is discharged as to the other makers. *Comstock v. Buckley*, 141 Wis. 228.

Cancellation by holder.—Under this section, when the payee of a note tears it up, with the intention of destroying and cancelling it, this is a discharge of the note. *Montgomery v. Schwald*, 177 Mo. App. 75.

Release of a joint party.—Thus, under subdivision four, the release of one joint maker will operate to discharge the others. *Case v. Bridger*, 133 La. 754. See also *Crawford v. Roberts*, 8 Oreg. 324. But to have this effect, the release must be under seal. *Shaw v. Pratt*, 22 Pick. 305.

Meaning of term in his own right.—The words "in his own right" in subdivision five, merely exclude such a case as that of a maker acquiring the instrument in a purely representative capacity. *Schwartzman v. Post*, 94 App. Div. (N. Y.) 474. If he should become the holder in a representative capacity, for example, as executor, the instrument would not be discharged. *Nash v. DeFreville* (1900), 2 Q. B. 72. And where the paper has been taken up by an indorser, the mere fact that it has come into the possession of the maker in some unexplained way does not operate as a discharge. *Korkemas v. Mackson*, 131 App. Div. (N. Y.) 728. Nor is it discharged when the maker acquired the paper as agent for another. *Peoples State Bank v. Dryden*, 91 Kans. 216.

Evidence.—This section points out and designates the acts which discharge the contract, but it does not prescribe the character of proof by which those acts are to be established. *Whitcomb v. Nat. Exchange Bank*, 123 Md. 613.

Payment through clearing-house.—On this subject, see *Columbia-Knickerbocker Trust Co. v. Miller*, 215 N. Y. 191.

§ 120. When person secondarily liable is discharged.
—A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

Variant readings.—In all states except New York and Maryland, the words "unless made with the assent of the party secondarily liable, or" appear after the word "instrument" in subdivision six. The omission appears to have been merely an error in engrossing. In Illinois the following changes are made: Subdivision three is omitted; at the end of subdivision five the following is added: "or unless the principal debtor be an accommodating party;" and subdivision six reads: "By an agreement in favor of the principal debtor binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent prior or subsequent of the party secondarily liable or unless the right of recourse against such party is expressly reserved, or unless the principal debtor be an accommodating party." In Missouri the words "except when such discharge is had in bankruptcy proceedings," are added at the end of subdivision three. In Wisconsin the words "or unless he is fully indemnified" are added at the end of the section; and a new subdivision, numbered 4a, is interpolated, as follows: "By giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder's hands or within his control the means of complete or partial satisfaction, the same are applied to other purposes."

Discharge of prior party.—It is a general rule that whatever discharges the maker or acceptor discharges the drawer and in-

dorser, who are sureties, for the contract which they undertook to assume thus passes out of existence by the act of the beneficiary. And whatever discharges a prior indorser discharges all subsequent indorsers, for the reason that he stood between them and the holder, and on making payment each one could have had recourse against him, but from which his discharge precludes them. The contracts of the parties are said to be like the links of a pendant chain; if the holder dissolves the first, every link falls with it. *Shutts v. Fingar*, 100 N. Y. 539; *Spies v. Nat. City Bank*, 174 N. Y. 222; *Couch v. Waring*, 9 Conn. 261; *Gennis v. Weighley*, 114 Pa. St. 194. But this rule, of course, does not apply where a prior party has been discharged by the laches of the intermediate indorser; for the holder need give notice only to his immediate indorser. *West River Bank v. Taylor*, 34 N. Y. 128, 131. And after the responsibility of an indorser has been fixed no act or dealing of the holder with the maker will discharge the indorser, except it be such an act as will defeat, impair or delay the right of the indorser, on paying the note, to recover against the maker. *Farmers' Bank v. Sprigg*, 11 Md. 390. Where the holder of a note, with several indorsers in blank, sues the maker and writes over the name of the first indorser an order to pay to himself, the holder, but without striking out the names of the subsequent indorsers, he does not thereby discharge them, and therefore one of them who pays the amount of the note to the holder may sue any of the prior parties. *Cole v. Cushing*, 8 Pick. 48. An indorser is discharged where the holder has allowed the statute of limitations to run against the maker. *Shutts v. Fingar*, 100 N. Y. 539.

Tender of payment by prior party.—See *Spurgeon v. Smiths*, 114 Ind. 453.

Security given by prior party.—The giving of a judgment or other security by the maker or a prior indorser does not discharge a subsequent indorser. *First Nat. Bank v. Peltz*, 176 Pa. St. 513; *Guarantee Co. v. Craig*, 155 Pa. St. 343.

Release of principal debtor.—By an express reservation of the holder's rights against the drawer or indorsers, their rights against the maker or acceptor are reserved by implication. *Gloucester Bank v. Worcester*, 10 Pick. 528; *Tombeckbe Bank v. Stratton*, 7 Wend. 429; *Stewart v. Eden*, 2 Cai. 121; *Second Nat. Bank v. Graham*, 246 Pa. St. 256.

Where extension requested by indorser.—Subdivision five refers to the unconditional discharge of the principal debtor, and has no application where the release is given by the holder at the request of the party secondarily liable. *Arlington Nat. Bank v. Bennett*, 214 Mass. 352. And oral evidence is admissible to prove that an unequivocal sealed instrument, which contains no reservation of a right of recourse against the indorser, was executed and delivered at the request of the indorser, and upon his promise to remain responsible. *Id.*

Necessity for express reservation of right of recourse.—As the statute requires the right of recourse against the party secondarily liable to be “expressly reserved” the reservation of such right cannot be implied from the acts and conduct of the parties. *Phenix National Bank v. Hanlon*, 183 Mo. App. 243.

Extending time of payment—Reason for the rule.—The rule has long been recognized that an indorser or surety is entitled to have the engagement of the principal debtor preserved without variation in its terms, and that his assent to any change therein is essential to the continuance of his obligation. The reason of the rule is that his right must not be affected upon the maturity of the indebtedness to make payment and, by subrogation to the creditor’s place, to at once proceed against the principal debtor to enforce repayment. Therefore it is that any agreement of the creditor, which operates to extend the time of payment of the original debt and supends the right to immediate action, is held to discharge the non-assenting indorser, or surety; for the law will presume injury to him thereby. The creditor may arrange with his debtor in any way which does not result in effecting either of these results. He may take, as collateral to the old note, new security, or other notes, and, if time is not given to the debtor, the indorser, or surety, will not be discharged. To prevent such a result, the agreement must expressly reserve all the remedies of the creditor against the indorser, or surety; in which case the latter will be in a position to pay immediately, and then to proceed against the principal debtor. *Nat. Park Bank v. Koehler*, 204 N. Y. 174, 179-180; *Riehl v. Austin*, 155 App. Div. (N. Y.) 207.

What extension will operate as a discharge.—Any extension, no matter how short, by a valid agreement, will discharge the in-

dorser or surety. *Cary v. White*, 52 N. Y. 138; *Nightingale v. Meginnis*, 34 N. J. Law, 461; *Siebeneck v. Anchor Savings Bank*, 111 Pa. St. 187; *In re Bishop's Estate*, 195 Pa. St. 85; *Friedenberg v. Robinson*, 14 Fla. 130. But there must be an enforceable agreement to this effect, either expressed or implied. Ordinarily the taking of a new note from the debtor, payable at a future day, suspends the right of action upon the original demand until the maturity of the new note, and hence discharges a non-assenting surety. *Union Trust Co. v. McCrum*, 145 App. Div. (N. Y.) 409; *Hubbard v. Gurney*, 64 N. Y. 450; *Place v. McIlvain*, 38 N. Y. 960; *Fridenberg v. Robinson*, 14 Fla. 130. But when the new security is payable on demand no presumption of an agreement arises. *Board of Education v. Fonda*, 77 N. Y. 350, 362. And where new security is taken merely as collateral, the fact that the collateral may not be enforceable until a definite time in the future does not operate to extend the time of payment of the principal debt, or suspend the right to sue on the original security. *Falkill National Bank v. Sleight*, 1 App. Div. (N. Y.) 189, 191; *United States v. Hodge*, 6 How. (U. S.) 279. Mere indulgence to the maker or acceptor will not discharge a drawer or indorser; there must be an agreement to extend the time of payment binding upon the holder. *Smith v. Erwin*, 77 N. Y. 466; *Bank of Utica v. Ives*, 17 Wend. 501; *Crawford v. Millsbaugh*, 13 Johns. 87; *Lockwood v. Crawford*, 18 Conn. 376; *Friedenberg v. Robinson*, 14 Fla. 130. And for this purpose the contract must be supported by a valid consideration. *Cary v. White*, 52 N. Y. 138. A part payment by the maker is not such a consideration, *Halliday v. Hart*, 30 N. Y. 474; nor is an agreement to pay interest, since it is merely a promise to do what the party is already bound to do. *Wilson v. Powers*, 130 Mass. 127; *Stuber v. Schack*, 83 Ill. 192.

Extending time to plead.—An indorser is not discharged by extending the maker's time to answer. *German-Am. Bank v. Niagara Cycle Co.*, 13 App. Div. (N. Y.) 450.

Where right of recourse is reserved.—Under subdivision six of this section, a surety on a note is not discharged by the taking of a renewal note where the extension is given with an express reservation of the right of recourse against the surety. *Dier v. Bank*, 129 Tenn. 89. But though renewal notes are taken under an express agreement between the maker and holder that the

indorser shall not be discharged, yet if subsequent renewals are made without such an agreement, the indorsers are discharged. In re Moritz Estate, 239 Pa. St. 375.

Same subject—Reason for the rule.—Inasmuch as the reservation of rights against the surety becomes a consideration of the contract for extension entered into with the debtor, the latter impliedly agrees that the surety may have all his original rights preserved against him as principal debtor; and while the creditor cannot bring suit against the principal pending the extension, the surety, if he pays the debt, may sue the principal at once therefor. The surety's contract is not changed, and there is no equitable reason to justify his discharge. *Meredith v. Dibrell*, 127 Tenn. 287. For the rule at common law, which is the same as that under the statute, see *Wagman v. Hoag*, 14 Barb. 233, 239; *Rockville National Bank v. Holt*, 58 Conn. 526; *Commercial Nat. Bank v. Simpson*, 90 N. C. 469; *Minir v. Crawford*, L. R. 2 Scotch Appeals, 456; *Kenworthy v. Sawyer*, 125 Mass. 28; *Morse v. Huntington*, 40 Vt. 488; *Hagey v. Hill*, 75 Pa. St. 108.

Burden of proof.—The burden of showing that the indorser assented to the extension of time is on the party seeking to charge him. *Siebeneck v. Anchor Savings Bank*, 111 Pa. St. 187.

Accommodation maker.—In the previous editions of this work, the author expressed the opinion that, under the statute, an accommodation maker will not be discharged by an extension of time granted to the indorser, for the reason that a maker, even for accommodation, is, by virtue of section 192, primarily liable upon the instrument. And this view has been adopted by the courts of Maryland, Missouri, Kentucky, Oregon, Washington, Utah, North Dakota and Arizona. *Vanderford v. Farmers' & Mechanics' Nat. Bank*, 105 Md. 164; *First State Bank v. Williams*, 164 Ky. 143; *Lane v. Hydes*, 163 Mo. App. 688; *Night & Day Bank v. Rosenbaum*, 177 S. W. Rep. (Mo. App.) 693; *Hunter v. Harris*, 56 Wash. 628; *Wolstenholme v. Smith*, 34 Utah, 300; *First Nat. Bank v. Meyer*, 152 N. W. Rep. (N. D.) 657; *Cowan v. Ramsay*, 15 Ariz. 533. A similar view was taken in New York by the Appellate Division, First Department, in *National Citizens' Bank v. Toplitz* (81 App. Div. 593), which, however, was affirmed in the Court of Appeals on other grounds (178 N. Y. 466). See also *Delaware County Trust Co. v. Title Ins. Co.*, 199 Pa. St. 17.

Same subject—Reason for the change.—The reason for the change mentioned above will be apparent. The rule which required the holder to treat an accommodation maker as a mere surety was often a trap for the unwary; for where an indorser applies for an extension, it will not always occur to the holder, even when he is a business man of intelligence and experience, that the consent of the maker is required. Nor does the rule adopted in the statute do any injustice to the maker. When a man signs a note as the principal obligor, he cannot complain if he is treated as being in fact what he appears to be upon the face of the paper. If he wishes to be dealt with as a surety, he should sign as indorser or guarantor, so as to indicate that that is the obligation he meant to assume. Indeed, the rule that an extension of time granted to the principal discharges the surety, without proof of any loss or injury to him, is based upon considerations that are theoretical, rather than practical; and when this rule is applied in favor of one who, upon the face of a negotiable instrument, has assumed a primary liability, gross injustice is likely to result.

Surrendering collateral—Wisconsin statute.—Under the provisions of the Wisconsin act, that "a person secondarily liable on the instrument is discharged * * * by giving up or applying to other purposes collateral security applicable to the debt," the surety is discharged only to an extent corresponding with the value of the security given up or applied to other purposes. *State Bank of La Crosse v. Michel*, 152 Wis. 88. This provision does not appear in the law as enacted in the other states. As in the case of some other local amendments, it seems to have been ill-considered and inaccurately expressed.

§ 121. Payment by party secondarily liable — effect of.—Where the instrument is paid by a party secondarily liable thereon, it is not discharge; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

Situation of indorser who has taken up the paper.—Where an indorser takes up the instrument, after it has been dishonored, by paying the amount of it to the holder, the transaction is in effect a repurchase of the paper, and not a payment of it, and the indorser becomes vested again with all the rights which he formerly had against prior parties. *Assets Realization Co. v. Mercantile Nat. Bank*, 167 App. Div. (N. Y.) 757; *French v. Jarvis*, 29 Conn. 347. And the paper retains its negotiable character. *Gould v. Eager*, 17 Mass. 615; *Davis v. Miller*, 14 Gratt. 1. And although in the case of accommodation paper, the indorsee may not pay actual value at the time of his indorsement, yet if he pays the instrument, and gets possession of it, he is deemed a holder. *Reinhart v. Schall*, 69 Md. 352.

Where party paying would have no cause of action.—The application of this section is necessarily limited to cases where the person secondarily liable can trace his title through the prior parties to the party whom he seeks to hold. If, when remitted to his former rights, he would have no cause of action against any party to the paper, payment by him discharges the instrument. *Quimby v. Varnum*, 190 Mass. 211.

Payment by second indorser.—Where payment is made by the second indorser, the case is within the provisions of this section. *Twelfth Ward Bank v. Brooks*, 63 App. Div. (N. Y.) 220.

Possession of paper as evidence.—Possession of the paper by an indorser, after its protest for non-payment, is *prima facie* evidence that he has performed his contract of indorsement, and has paid to the holder the amount due. *Hill v. Buchanan*, 71 N. J. L. 301. See section 119.

Striking out indorsements.—It is necessary to strike out all subsequent indorsements; for after the paper has once been paid it cannot be negotiated again if such negotiation would make any of the parties liable who would otherwise be discharged. *Goodner v. Maynard*, 7 Allen, 456; *Citizens' Bank v. Say*, 80 Va. 436. And by putting the note in circulation again the liability of subsequent parties is not revived. *Davis v. Miller*, 14 Gratt. 1.

Payment by drawee.—Payment by a bank of a check drawn upon it, in the usual course, and in the absence of fraud, or mistake of fact, extinguishes the instrument, and the bank by thereafter putting it in circulation cannot create a liability thereunder against the maker or prior indorser. *Aurora State Bank v. Hayes-Eames Elevator Co.*, 88 Neb. 187.

Right of set-off.—This section does not preclude an indorser of a note who has paid the same upon the insolvency of the maker from claiming a set-off against one to whom the maker had assigned a debt due from the indorser. *Nolan Bros. Lumber Co. v. Dudley Lumber Co.*, 128 Tenn. 11.

Who entitled to again negotiate paper.—The words “remitted to his former rights,” as used in this section, apply only to a party secondarily liable who has himself been connected with the title to the instrument. *Lill v. Gleason*, 92 Kas. 254. See also *Miller v. Del Rio Mining Co.*, 25 Idaho, 83.

Note in hands of maker.—A note coming into the hands of the maker under such circumstances as to raise a presumption of its payment cannot be pledged by him as collateral so as to bind a surety, although the note may not have matured at the time of its reissue. *First National Bank v. Harris*, 7 Wash. 139.

Accommodation paper.—Where the instrument is paid by an accommodation acceptor it is discharged, and becomes commercially dead, but is evidence in the hands of the payer to charge the real debtor. *Cottrell v. Watkins*, 89 Va. 801; *First Nat. Bank v. Maxfield*, 83 Me. 576. So, where one of several accommodation makers pays the note, it remains in his hands evidence of his right to contribution from his co-sureties. This right may be assigned by him, and the delivery of the note by him to a third person for a valuable consideration raises a presumption of an intention to pass this right to the transferee. *Dillenbeck v. Bygert*, 97 N. Y. 303. Where an accommodation indorser for the payee has paid the note he may recover the amount of an accommodation maker. *Laubach v. Pursell*, 35 N. J. Law, 434. And where a second indorser of a note has paid and taken it up he becomes a holder for value, and may maintain an action to recover the amount thereof of the first indorser, although both are accommodation indorsers. *Kelly v. Burroughs*, 102 N. Y. 93. See also *Kaschner v. Conklin*, 40 Conn. 81. But where the instrument was made for the accom-

modation of the indorser, payment by him discharges it. *Josephson v. Gens*, 85 Misc. (N. Y.) 372. See section 68.

§ 122. Renunciation by holder.—The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

Parties primarily and secondarily liable.—In *Leask v. Dew*, 102 App. Div. (N. Y.) 529, 534, it was said by Hatch, J.: "There is some obscurity in the provisions of our statute. In its first sentence it provides for the renunciation of the rights of the holder against any party to the instrument which may be made before, at or after its maturity. In the second sentence it provides for an absolute and unconditional renunciation of the rights of the holder against the principal debtor at or after the maturity of the instrument, which discharges the instrument. The first relates to the party; the second to the instrument. It is somewhat difficult to see how there could be an absolute discharge of a party to an instrument without discharging the instrument as an obligation so far as he is concerned. We do not clearly perceive why this distinction should have been made." But upon reflection, it will be seen that the distinction is indispensable. If the party in whose favor the renunciation is made is only secondarily liable, then only he and parties subsequent to him are discharged, and the instrument still remains in force as to prior parties. See section 120, subdivision 3. But when the holder renounces his rights against the person primarily liable, then the instrument itself is discharged. The learned judge writing as above-mentioned evidently had in mind the facts of the case before the court, where the maker was the only party to the paper, and he thus failed to note the situation which will arise where there are a number of indorsers. Thus, if a bill drawn by A and accepted by B, should be indorsed by C and D, a renunciation in favor of D

would discharge him only, and a renunciation in favor of C would discharge only C and D; but a renunciation in favor of B, the acceptor, would discharge the instrument.

Necessity for writing.—Unless the instrument be delivered up the renunciation can be proved only by the holder's written declaration. *Whitcomb v. Nat. Exchange Bank*, 123 Md. 612; *Baldwin v. Daly*, 41 Wash. 416. After a testator's death, there was found among his papers, inclosed in an envelope, a promissory note payable to him and an instrument signed by him and addressed to his executors stating, "Gentlemen: The enclosed note I wish to be cancelled in case of my death, and if the law does not allow it, I wish you to notify my heirs that it is my wish and orders." *Held*, that this was not a renunciation within the statute. *Leask v. Dew*, 102 App. Div. (N. Y.) 529.

Consideration.—The term "renunciation" as used in this section describes the act of surrendering a right of claim without recompense, but it can be applied with equal propriety to the relinquishment of a demand upon an agreement supported by a consideration. *Whitcomb v. Nat. Exchange Bank*, 123 Md. 612.

§ 123. Unintentional cancellation—burden of proof.
—A cancellation made unintentionally, or under a mistake, or without authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

Burden of proof.—Upon the trial, the signature of the indorser appeared to have been cancelled, and the plaintiff claimed that it was cancelled without authority: *Held*, that, under the statute, the burden of showing this was on the plaintiff. *McCormick v. Shea*, 50 Misc. (N. Y.) 592.

§ 124. Alteration of instrument—effect of.—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided,

except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

Variant readings.—In Illinois the words “fraudulently altered by the holder” are substituted for “materially altered.” In Wisconsin the words “orally or in writing” are interpolated after the words “authorized or assented.” In South Dakota the words “by the holder” are interpolated after the word “altered.”

Burden of proof.—The burden of explaining an apparent alteration is upon the party producing the paper. *Gowdey v. Robbins*, 3 App. Div. 353; *Ofenstein v. Bryan*, 20 App. Cas. D. C. 1; *Town of Solon v. Williamsburgh Savings Bank*, 114 N. Y. 122, 135; *Simpson v. Davis*, 119 Mass. 269; *Gettysburg National Bank v. Chisolm*, 169 Pa. St. 564; *Citizen's Nat. Bank v. Williams*, 174 Pa. St. 66; *Paine v. Edsell*, 19 Pa. St. 178. If the paper appears to have been altered he must explain this appearance; but if, on the other hand, however material in fact the alteration may be, there is upon the face of the paper no evidence or mark raising a suspicion thereof, the holder is not called upon to make an explanation or to introduce any testimony until the alteration has been shown by sufficient evidence outside of the paper. *Harris v. The Bank of Jacksonville*, 20 Fla. 501, 512. And where there is nothing on the face of the paper and no other evidence to indicate an alteration, there is no question to be submitted to the jury. *Brown v. Marmaduke*, 248 Pa. St. 247. But see *Ensign v. Fogg*, 177 Mich. 317, where it was held that if there is nothing suspicious upon the face of the paper beyond the fact that an erasure is manifest, the presumption is that any alteration appearing thereon was made before the execution of the instrument. In Massachusetts when a note or bill is offered which appears to have been altered, the practice is for the presiding judge to determine, upon inspection of the paper and in view of the state of the evidence at the time, whether further proof in explanation of the alteration shall be required before the instrument is admitted. *Wood v. Shelley*, 196 Mass. 114.

Recovery according to original tenor.—The provision authorizing a recovery by a holder in due course according to the original tenor of the instrument changes the law in some states. Prior to the statute the rule in many jurisdictions was that where the alteration was made without the consent of the party sought to be charged there could be no recovery even by an innocent holder for value, and even though he sought to recover on the instrument as it was before the alteration. *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. St. 564; *Hartley v. Carboy*, 150 Pa. St. 23; *Wood v. Steele*, 6 Wall. 80; *Citizen's Nat. Bank v. Richmond*, 121 Mass. 110; *Tower v. Stanley*, 220 Mass. 429. In the case first cited it was said: "In the present case, the alteration was not probably made by an agent of the payee, and it was entirely without the knowledge and consent of the defendant, who was the maker of the note. Of course, the payee could not recover on the note for any amount, because it was an altered instrument, and is avoided altogether by public policy. Certainly he could not restore life to it by passing it over to an indorsee." But compare *Gleason v. Hamilton*, 138 N. Y. 353; *Town of Solon v. Williamsburgh Savings Bank*, 114 N. Y. 122, 134. For cases applying this provision of the statute, see *Colonial Nat. Bank v. Duerr*, 108 App. Div. (N. Y.) 215; *Moskowitz v. Deutsch*, 46 Misc. (N. Y.) 602; *Thorpe v. White*, 188 Mass. 333; *Broadway Nat. Bank v. Heffernan*, 220 Mass. 247; *Stone v. Sargent*, Id. 245; *Munroe v. Stanley*, Id. 438; *Jeffrey v. Rosenfeld*, 179 Mass. 506; *Levy v. Arons*, 81 Misc. (N. Y.) 165. See also *Builders' Lime & Cement Co. v. Weimer*, 151 N. W. Rep. (Iowa) 100.

Same subject—Paper overdue.—The provision authorizing a recovery according to the original tenor of the instrument has no application to paper transferred when past due, since the holder in such case is not a holder in due course. *Fairfield Nat. Bank v. Hammer*, 95 Atl. Rep. (Conn.) 31.

Raised check.—Where a bank has paid a raised check, an accommodation indorser may be held for the difference between the check as originally drawn and the amount to which it was raised. *Smith v. State Bank*, 104 N. Y. Supp. 750.

Alteration in name of payee.—The provision authorizing a recovery according to the original tenor of the instrument can have no application where the alteration is in the name of the payee.

First Nat. Bank v. Girdley, 112 App. Div. (N. Y.) 398; Andrews v. Sibley, 220 Mass. 10.

Difference between filling in blanks and alteration.—Where the paper has been delivered with the amount blank, it is no defense against a *bona fide* holder for value for the maker to show that the authority has been exceeded in filling such blank, and a greater amount written than was intended. But if the instrument was complete without blanks, at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention will constitute a material alteration. In the latter case, under section 124, payment may be enforced according to the original tenor of the instrument. Nat. Exchange Bank v. Lester, 194 N. Y. 461. The difference between the two cases is well illustrated by the case of First Nat. Bank of Wilkes Barre v. Burnum, 160 Fed. Rep. 245. There B, for the accommodation of his brother, placed his indorsement on a printed form of promissory note, which contained the words "at the Second National Bank of Wilkes Barre, Pa.," and the brother, besides filling out the blanks, struck out the name of the second National Bank, and inserted the name of another bank, which discounted the note: *Held*, that while the filling out of the blanks was impliedly authorized, the change of the name of the bank where the instrument was to be payable was a material alteration and discharged the indorser.

Where blank spaces are left in paper.—There is no obligation resting upon the maker or drawer to so prepare the paper that no one can successfully tamper with it; and he is not rendered liable for an increased sum by the fact that blank spaces were left before the words and figures specifying the amount so as to invite alteration. Nat. Exchange Bank v. Lester, 194 N. Y. 461. Compare Timble v. Garfield Nat. Bank, 121 App. Div. (N. Y.) 870. See also note to section 14.

Pleading.—In cases of mere spoliation, where the original tenor was apparent upon inspection, it has been held sufficient to declare on the instrument in such form, and upon the spoliation being shown, there is no variance between the allegation and the proof. Drum v. Drum, 133 Mass. 566. A similar rule would now seem to apply where there was proof that the plaintiff was not a party to the alteration. Whether the holder of a note originally stated to be payable "with interest," no rate being named, and altered by the

insertion of the words "seven per cent.," must declare on the note as it was before the alteration in order to recover interest upon it at six per cent., *quære*. *Massachusetts National Bank v. Snow*, 187 Mass. 160.

§ 125. What constitutes a material alteration.—Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

Alteration in date.—See *National Ulster County Bank v. Madden*, 114 N. Y. 280; *Crawford v. West Side Bank*, 100 N. Y. 50, 56; *Moskowitz v. Deutsh*, 46 Misc. (N. Y.) 603; *Wood v. Steele*, 6 Wall. 80; *Newman v. King*, 54 Ohio St. 273; *Pensecola State Bank v. Melton*, 210 Fed. Rep. 57.

Amount of principal.—See *Batchelder v. White*, 80 Va. 103. The alteration is material, though the amount is lessened, as where \$500 was changed to \$400. *Hewins v. Cargill*, 67 Me. 554.

Rate of interest.—Adding the words "with interest at six per cent." is a material alteration. *Broadway Nat. Bank v. Heffernan*, 220 Mass. 247; *Columbia Distilling Co. v. Rech*, 151 App. Div. (N. Y.) 128; *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. St. 564. So, the addition of the words "with interest at eight per cent. per annum after due until paid." *Colonial Nat. Bank v. Duerr*, 108 App. Div. (N. Y.) 215. Or merely the words "with interest." *Dunbrow v. Gelb*, 72 Misc. (N. Y.) 400.

Time of payment.—Changing the date of maturity from May 15, 1907, to May 15, 1908, is a material alteration. *Pensecola State Bank v. Melton*, 210 Fed. Rep. 57. See also *Rogers v. Bosburgh*,

87 N. Y. 208; *Weyman v. Yeomans*, 84 Ill. 403; *Miller v. Gilleland*, 19 Pa. St. 119.

Place of payment.—See *Tidmarsh v. Grover*, 1 Maule & S. 735; *Bank of Ohio Valley v. Lockwood*, 13 W. Va. 392. A note was made upon a printed blank in which the People's Bank of "S" was named as the place of payment. After the note was signed, the name People's Bank was struck out and the name First National Bank of "S" written in, the latter having been organized as successor to the People's Bank and which continued business in the same banking house: *Held*, that the alteration was not material. *Melton v. Pensacola Bank & Trust Co.*, 190 Fed. Rep. 126, 111 C. C. A. 166.

Change in parties.—Changing the name of the payee. *First Nat. Bank v. Gridley*, 112 App. Div. (N. Y.) 398; *Hoffman v. Planter's Bank*, 99 Va. 480. The indorsement of a third person on the back of a note underneath the signature of the payee, is conclusively presumed to be that of a subsequent indorser, and not that of a joint maker or surety, and hence it may not be regarded as a material alteration. *Ensign v. Fogg*, 177 Mich. 317. In *McCaughy v. Smith*, 27 N. Y. 39, and *Brownell v. Winnie*, 29 N. Y. 400, it was held that the addition of another name as maker, where there was but one, was not a material alteration, the additional maker being regarded as a guarantor. The statute has probably changed this rule.

As to medium of payment.—Thus, adding to a note the words "in gold coin" is a material alteration. *Wills v. Wilson*, 3 Oregon, 308. See also *Angle v. Insurance Co.*, 92 U. S. 330; *Church v. Howard*, 17 Hun, 5; *Darwin v. Rippey*, 63 N. C. 318; *Bogarth v. Breedlove*, 39 Tex. 561.

Adding place of payment.—See *Whitesides v. Northern Bank*, 10 Bush, 501.

Striking out stipulation.—Where the paper contains a stipulation which renders it non-negotiable, the striking out of such stipulation is a material alteration, since it changes the instrument from a non-negotiable to a negotiable instrument. *Farmers' Bank v. Scoggins*, 41 Okla. 719.

Where paper payable to order is changed to bearer.—A change in a note payable to order by striking out the words "or order" and

inserting after the name of the payee the words "or bearer" is a material alteration. *Builder's Lime & Cement Co. v. Weimer*, 151 N. W. Rep. (Iowa) 100.

Addition of special agreement.—See *Weyerhauser v. Dun*, 100 N. Y. 150.

Adding name of attesting witness.—In some states it has been held that the addition of the name of an attesting witness is a material alteration. *Smith v. Dunham*, 8 Pick. 246; *Homer v. Wallis*, 11 Mass. 310; *Thornton v. Appleton*, 29 Me. 298; *Brackett v. Mountfort*, 11 Me. 115. But in those states the attestation extends the liability of the maker under the statute of limitations, and so changes to some extent the nature of the contract and enlarges its obligations. In other states where such addition would not have this effect the alteration would not be material. *Fuller v. Green*, 64 Wis. 159.

ARTICLE X.

BILLS OF EXCHANGE; FORM AND INTERPRETATION.

Section 126. Bill of exchange defined.

127. Bill not an assignment of funds in hands of drawee.

128. Bill addressed to more than one drawee.

129. Inland and foreign bills of exchange.

130. When bill may be treated as promissory note.

131. Referee in case of need.

§ 126. Bill of exchange defined.—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

Essentials of a bill.—The definition given by Justice BYLES, which has often been cited, is “A bill of exchange is an unconditional written order from A to B directing B to pay C a sum certain of money therein named.” Byles on Bills, 1. But the objection to this definition is that it omits all reference to the negotiable character of the instrument. It is essential that the drawer should *require*, and not merely request, payment; but if the language imports a direction to pay, it is sufficient, though the direction is expressed in words of civility, as for example, where the terms were “Mr. Nelson will much oblige Mr. Webb by paying J. Ruff or order, twenty guineas on his account.” Ruff v. Webb, 1 Esp. 129. Formerly it seems to have been essential to the validity of a bill of exchange that it should be drawn in one place and payable in another. See note of Mr. Sergeant Manning to Miller v. Thompson, 4 M. & G. 260.

§ 127. Bill not an assignment of funds in hands of drawee.—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

Rule at common law.—This section does not change the law. See *Harris v. Clark*, 3 N. Y. 93; *Mandeville v. Welch*, 5 Wheat. 286; *Brill v. Tuttle*, 81 N. Y. 454; *Alger v. Scott*, 54 N. Y. 14; *Munger v. Shannon*, 61 N. Y. 251; *Commonwealth v. Am. Life Ins. Co.*, 167 Pa. St. 586; *Reilly v. Daly*, 159 Pa. St. 605; *Bailey v. Southwestern R. R. Bank*, 11 Fla. 266; *Rambo v. First State Bank*, 88 Kan. 257. For a case applying this section, see *Clayton Town Site Co. v. Clayton Drug Co.*, 147 Pac. Rep. (N. M.) 460. As to checks, see section 189 and note.

When order amounts to an assignment.—When, for a valuable consideration from the payee, the order is drawn upon a third person and made payable out of a particular fund, then due or to become due, from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund, and the drawee is bound, after notice of such assignment, to apply the fund, as it accrues, to the payment of the order and to no other purpose, and the payee may, by action, compel such application. *Brill v. Tuttle*, 81 N. Y. 454, 457.

Assignment by implication.—An intention to make an assignment of the funds in the hands of the drawee may be inferred from the circumstances attending the delivery of the draft and the conduct of the parties. *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83.

§ 128. Bill addressed to more than one drawee.—A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

Variant readings.—In Wisconsin the words “or in succession” at the end of the section are omitted.

§ 129. Inland and foreign bills of exchange.—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

Rule at common law.—It had long been settled by authority that a bill drawn in one state and addressed to the drawee in another state is a foreign bill. *Commercial Bank of Kentucky v. Varnum*, 49 N. Y. 269; *Life Insurance Company v. Pendleton*, 112 U. S. 696; *Armstrong v. American Ex. National Bank*, 133 U. S. 433; *Buckner v. Finley*, 2 Peters, 586; *Joseph v. Solomon*, 19 Fla. 623; *Phoenix Bank v. Hussey*, 12 Pick. 483; *Thompson v. Commercial Bank*, 3 Cald. 49; *Union Bank v. Fowlkes*, 2 Sneed, 556.

Foreign bill under the statute.—Under this section a bill addressed by a firm doing business in New York to a firm doing business in Vienna is a foreign bill. *Amsinek v. Rogers*, 189 N. Y. 252; *Casper v. Kuhne*, 159 App. Div. 389. So, a check dated in one state, and drawn upon a bank in another state, is a foreign bill. *Mankey v. Hoyt*, 27 S. D. 561.

Cause of action—Locality of.—Where payment of a demand bill of exchange, drawn on a New York bank, is refused, a cause of action arises in this state in favor of the holder against the drawer. *Riddle v. Bank of Montreal*, 145 App. Div. (N. Y.) 207.

§ 130. When bill may be treated as promissory note.—Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

Variant readings.—In Wisconsin the words “or a person,” before the words “not having capacity to contract,” are omitted.

Bill drawn by agent upon his principal.—A draft drawn by an agent upon his principal by authority of the latter, is equivalent to a draft drawn by the principal and may be treated as a promissory

note under this section. *First Nat. Bank v. Home Ins. Co.*, 16 N. M. 66; *Clemens v. Staunton Co.*, 61 Wash. 419.

§ 131. Referee in case of need.—The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

Variant reading.—By an error in engrossing, the word “thereon” is substituted for therein.

How referee indicated.—The usual form is “In case of need, apply to Messrs. C. and D, at E.” *Chitty on Bills*, 165.

ARTICLE XI.

ACCEPTANCE OF BILLS OF EXCHANGE.

- Section 132.** Acceptance—how made—form of.
- 133. Holder entitled to acceptance on face of bill.
 - 134. Acceptance by separate instrument.
 - 135. Promise to accept—when equivalent to acceptance.
 - 136. Time allowed drawee to accept.
 - 137. Liability of drawee retaining or destroying bill.
 - 138. Where bill incomplete, etc.
 - 139. Kinds of acceptances.
 - 140. Acceptance to pay at particular place.
 - 141. Qualified acceptance.
 - 142. Rights of parties as to qualified acceptance.

§ 132. Acceptance—how made—form of.—The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

Nature of contract.—The acceptance is a response to the direction contained in the bill, and the language of the bill and the acceptance are but parts of one entire contract in writing. *Meyer v. Beardsley*, 29 N. J. Law, 236. But this contract is regarded as a new contract. *Superior City v. Ripley*, 138 U. S. 93.

How acceptance made.—The usual mode of making an acceptance is by writing the word "accepted," and subscribing the drawee's name. *Byles on Bills*, 190. But the drawee's signature

alone is sufficient. *Spear v. Pratt*, 2 Hill, 582; *Wheeler v. Webster*, 1 E. D. Smith, 1.

Acceptance on bill.—The English Bills of Exchange Act, following previous English statutes (1 and 2 George IV., C. 78; 19 and 20 Victoria, C. 78) requires that the acceptance be written on the bill. The American statutes do not generally require this (see 1 Rev. Stat., N. Y., 768, section 6; Laws of Pa., 1881, 17); and such a requirement would sometimes work inconvenience. Thus, it has been held that a bank can accept a check by telegraph, and such an acceptance has been deemed to be within the terms of a statute requiring acceptances to be in writing; but to require the acceptance to be on the instrument itself would preclude the giving of an acceptance by telegraph either by a bank or by any other drawee. See next section.

Oral acceptance.—At common law an oral acceptance was sufficient. *Scudder v. Union Bank*, 91 U. S. 406; *Hall v. Cordell*, 142 U. S. 116; *Jones v. Council Bluffs Branch, etc.*, 34 Ill. 313; *Sturges v. Chicago Fourth Nat. Bank*, 75 Ill. 595; *Ward v. Allen*, 2 Metc. 53; *Cook v. Baldwin*, 120 Mass. 317. The introduction of this doctrine, however, was often regretted. In *Clark v. Coch*, 4 East. 72, LAWRENCE, J., said: "It would have been much better doctrine if it had been originally determined that nothing else should amount to an acceptance than a written acceptance on the bill itself."

Necessity for written acceptance.—The provision of this section that the acceptance must be in writing applied in *Izzo v. Ludington*, 79 App. Div. (N. Y.) 272; *Faircloth-Byrd Mer. Co. v. Adkinson*, 167 Ala. 344; *Hanna v. McCrory*, 141 Pac. Rep. (N. M.) 998; *Nelson v. Nelson Bennett Co.*, 31 Wash. 116; *Wadhams v. Portland Elc. Ry. Co.*, 37 Wash. 86; *Frederick v. Spokane Grain Co.*, 47 Wash. 85; *Clayton Town Site Co. v. Clayton Drug Co.*, 147 Pac. Rep. (N. M.) 460.

Promise to pay check.—As the statute requires all acceptances to be in writing, a bank cannot be held upon the oral promise of one of its officers to pay a check. *Van Buskirk v. State Bank of Rocky Ford*, 35 Colo. 142; *Rambo v. First State Bank of Argentine*, 88 Kan. 257; *Hanna v. McCrory*, 141 Pac. Rep. (N. M.) 998; *Ballen v. Bank of Krenlin*, 37 Okla. 112. Thus, where the

payee of a check visited the bank on which the check was drawn and was assured that the drawer had sufficient funds on deposit, and that if the check were deposited in the payee's bank it would be honored, and the drawer withdrew his entire deposit before the check was presented: *Held*, that under this section the bank was not liable. *Ewing v. Citizens' Nat. Bank*, 162 Ky. 551.

Acceptance by telegraph.—H. sent a telegram to M. reading "Will you wire me that you will honor draft for \$300," and M. telegraphed back, "I will:" *Held*, that this was a sufficient acceptance under the statute. *Oil Well Supply Co. v. MacMurphy*, 119 Minn. 500. See also *First Nat. Bank v. Muskogee Pipe Line Co.*, 40 Okla. 603; *North Atchison Bank v. Garretson*, 51 Fed. Rep. 167.

Delivery.—The acceptance is incomplete until delivery or notification. *First Nat. Bank of Murfreesboro v. First Nat. Bank of Nashville*, 154 S. W. Rep. (Tenn.) 965.

Pleading.—As the statute requires the acceptance to be in writing, the fact that it was so given must be pleaded. *Wadhams v. Portland, etc., Ry. Co.*, 37 Wash. 86.

§ 133. Holder entitled to acceptance on face of bill.—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and, if such request is refused, may treat the bill as dishonored.

Source of section.—See 1 Rev. Stat., N. Y., section 9.

§ 134. Acceptance by separate instrument.—Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

Variant readings.—In Illinois the words "to whom it is shown and," after the word "person" and before the word "who," are omitted.

Source of section.—See 1 Rev. Stat., N. Y., 768, section 7.

Where paper is attached to draft.—A written agreement modifying the terms of an accepted bill and securely attached thereto is a part thereof and cannot be lawfully detached therefrom without the maker's consent. *Bothell v. Schweister*, 84 Neb. 271.

Letter accompanying bill.—Since the acceptance need not be on the instrument itself, a letter accompanying the bill may be used to qualify or limit an acceptance indorsed on the bill. *Lehnhard v. Sidway*, 160 Mo. App. 83. But, of course, an innocent holder would not be affected by anything contained in the letter.

§ 135. Promise to accept — when equivalent to acceptance.—An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

Variant readings.—In Illinois the words "or after" are interpolated after the word "before."

Source of section.—See 1 Rev. Stat., N. Y., 768, section 8. The section is merely declaratory of the common law. *Muller v. Kling*, 149 App. Div. (N. Y.) 176.

Oral promise to accept.—The requirement that the promise shall be in writing is wholly statutory. At common law an oral promise was sufficient. *Dull v. Bricker*, 76 Pa. St. 255; *Scudder v. Union Nat. Bank*, 91 U. S. 406; *Williams v. Cinans*, 2 Gr. (N. J.) 239; *Jarvis v. Wilson*, 46 Conn. 91.

Nature of the promise.—The promise must be unconditional. *Germania National Bank v. Tooke*, 101 N. Y. 442; *Shover v. Western Union Telegraph Co.*, 57 N. Y. 459, 463. But restrictions as to the time or amount do not prevent the promise from being treated as unconditional and absolute as to drafts within the limitation. *Bank of Michigan v. Ely*, 17 Wend. 508; *Ulster Co. Bank v. McFarlan*, 5 Hill, 432. And an authority given to an agent to draw from time to time, as may be necessary in the purchase of goods, or as he may need funds, operates simply as an instruction to the agent, and does not, as to persons dealing with him in good faith, constitute a condition. *Merchants' Bank v. Griswold*, 72 N. Y. 472; *Bank of Michigan v. Ely*, 17 Wend. 508. As to what will

amount to a promise to accept, see *Bank of Morganton v. Hay*, 143 N. C. 326.

Representation of agent.—The party dealing with the agent may rely upon his representation, express or implied, that the draft is in the business of the principal, or that the funds are needed, and he is protected, although it turns out that the representation is false. *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Merchants' Bank v. Griswold*, 72 N. Y. 472.

Variance.—Where one has agreed to accept a draft for a certain sum, he cannot refuse payment because the draft, when presented, includes the words "with exchange," no place of exchange being named and the draft being payable at the residence of the drawee, and the evidence failing to show that exchange was sought to be charged or collected. *First National Bank v. Muskogee Pipe Line Co.*, 40 Okla. 603.

Promise by telegraph.—A promise to accept given by telegraph satisfies the requirement that the promise shall be in writing. *Johnson v. Clark*, 39 N. Y. 216; *North Atchison Bank v. Garretson*, 51 Fed. Rep. 167; *Franklin Bank v. Lynch*, 52 Md. 270. As to countermanding by telegraph an offer to accept, see *First Nat. Bank v. Clark*, 61 Md. 400.

Reliance upon promise.—The holder must acquire the bill on the faith of the promise to accept. *Howland v. Carson*, 15 Pa. St. 453.

Where promise is conditional.—An agreement to accept is still but an agreement, and if it is conditional, and a third person takes the bill knowing of the conditions, he takes subject to such conditions. *Muller v. Kling*, 149 App. Div. (N. Y.) 176, 181; *Corrugating Co. v. Taylor*, 95 Kans. 562. In the case first cited the court said: "To be sure, the Negotiable Instruments Law only covers the case of an unconditional promise to accept, doubtless because, in general, conditions attached to commercial paper deprive it of the attribute of negotiability, though an acceptance of a bill may be conditional."

By what law governed.—A promise to accept is governed by the law of the state where it is made, notwithstanding it is to be performed elsewhere. *Scott v. Pilkington*, 15 Abb. Pr. 280.

§ 136. Time allowed drawee to accept.—The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.

Reason for the rule.—When the bill is presented, it is reasonable that the drawee should be allowed some time to deliberate whether he will accept or not; and by the rule of the law merchant he was entitled to demand twenty-four hours for this purpose, and the holder was justified in leaving the bill with him for that period. *Byles on Bills*, 182. See also *Case v. Burt*, 15 Mich. 82. See next section. By the former statute of Massachusetts, the drawee had until two o'clock on the day following. (*Public Statutes*, 1882, ch. 77, section 17.)

Check presented for acceptance.—Where a check is presented for acceptance the bank may, if it sees fit, demand twenty-four hours in which to decide whether to accept or not. *First Nat. Bank of Murfreesboro v. First Nat. Bank of Nashville*, 154 S. W. Rep. (Tenn.) 965. In the case cited the court appears to confuse the case of a check presented for payment with the case of a presentment for acceptance.

Date of acceptance.—The provision that the acceptance is to date as of the day of presentation conforms to what was the common practice; but there were no judicial decisions upon the point.

§ 137. Liability of drawee retaining or destroying bill.—Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

Variant readings.—In Illinois and South Dakota this section is omitted. In Wisconsin the following is added at the end of the section: "Mere retention of the bill is not acceptance." In Pennsylvania the section has been amended by the addition of a

proviso as follows: "Provided, that the mere retention of such bill by the drawee, unless its return has been demanded, will not amount to an acceptance; and provided further that the provisions of this section shall not apply to checks." Laws 1909, No. 169. See note below.

Mere omission to return bill.—This section was taken without change from a New York statute which had been in force for many years. 1 Rev. Stat., N. Y., 769, section 11. This statute had been construed by the Court of Appeals, which held that the refusal spoken of meant an affirmative act, and that a mere omission to return, where there was no demand, was not a "refusal" within the meaning of the statute. *Matteson v. Moulton*, 79 N. Y. 627. See also *Westberg v. Chicago Lumber & Coal Co.*, 117 Wis. 589. And this seems to be the plain import of the language used. But the Supreme Court of Pennsylvania, construing the section, held that mere neglect to return the paper may constitute such a refusal. *Wisner v. First Nat. Bank*, 220 Pa. St. 21. In this case certain checks were forwarded to the drawee bank for collection, and the drawer not having sufficient funds on deposit to pay them, the bank delivered them for protest to a notary public, who held them without protesting them, or giving notice of dishonor, and in this way the checks were retained for more than two days after their delivery to the bank:—*Held*, that such retention of the checks by the bank was an acceptance within this section. But it is difficult to see how the statute could apply to such a state of facts. It refers only to cases where the paper is presented for acceptance; and where checks are remitted to the drawee bank, the obvious purpose is to present them for payment, and not mere acceptance. What the holder desires in such a case, is that the bank shall remit the money, not that it shall return the check with its acceptance placed thereon. The decision of the Supreme Court of Pennsylvania referred to above led to the amendment of 1909; and now in that state all acceptances of checks must be in writing, and retention by the drawee cannot, in the case of a check, amount to an acceptance. *Union Nat. Bank v. Franklin Nat. Bank*, 249 Pa. St. 375. See note "Variant Readings" above.

Non-negotiable paper.—This section has no application where the bill is non-negotiable. *First Nat. Bank of Omaha v. Whitmore*, 177 Fed. Rep. 397.

§ 138. Where bill incomplete or has been dishonored.

—A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

Variant readings.—In South Dakota the word “payable” is interpolated between the words “bill” and “accepted” near the end of the section. This is probably an error in engrossing.

§ 139. Kinds of acceptances.—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

Place of payment.—Where a bill is addressed to the drawee in one place, and is accepted payable in another, this is a material variation. *Walker v. Bank of State of N. Y.*, 13 Barb. 636; *Niagara Bank v. Fairman Co.*, 31 Barb. 403. But a bill addressed generally to a drawee in a city may be accepted payable at a particular bank in that city. *Troy City Bank v. Lanman*, 19 N. Y. 477; *Meyers v. Standart*, 11 Ohio St. 29. And a bill so accepted is equivalent to a check. See section 87.

§ 140. Acceptance to pay at particular place.—An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

Acceptance payable at a particular place.—Before the enactment of the 1 and 2 George IV., c. 78, it was a point much dis-

puted whether, if a bill payable generally was accepted payable at a particular place, such an acceptance was a qualified one. Byles on Bills, 194. The House of Lords finally held that an acceptance payable at a particular place was a qualified acceptance, rendering it necessary, in an action against the acceptor, to aver and prove presentment at such place. *Rome v. Young*, 2 Brod. & Bing. 165, 2 Bligh, 391. This led to the passage of the statute above mentioned, called Sergeant Onslow's act, which provided that an acceptance payable at a particular place should be deemed a general acceptance unless expressed to be payable there "only and not otherwise or elsewhere." In the United States the weight of authority has been contrary to the decision of the House of Lords, and in favor of the rule as stated in this section. *Wallace v. McConnell*, 13 Peters, 136. See also note to section 70.

§ 141. Qualified acceptance.—An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

Where payment is made to depend upon condition.—Such an acceptance does not become due until the happening of the contingency upon which the bill is accepted. *Brockway v. Allen*, 17 Wend. 40; *Newhall v. Clark*, 3 Cush. 376; *Myrick v. Merritt*, 22 Fla. 335; *Marshall v. Burnby*, 25 Fla. 619. A telegram in the following form "Will pay McMillan's draft on me two fifty for horses," is not a conditional acceptance and the bank cashing the same may hold the acceptor though the money was applied by the drawer to another purpose. *State Bank of Beaver County v. Bradstreet*, 89 Neb. 186.

§ 142. Rights of parties as to qualified acceptance.—

The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

Liability where qualified acceptance taken.—But if the holder receives such an acceptance he can claim payment only according to the condition or qualification. *Cline v. Miller*, 8 Md. 274.

Duty of collecting agent.—An agent for collection, as, for example, a bank, has no authority to receive anything short of an explicit and unqualified acceptance. *Walker v. New York State Bank*, 9 N. Y. 582.

ARTICLE XII.

PRESENTMENT FOR ACCEPTANCE.

Section 143. When presentment for acceptance must be made.

144. When failure to present releases drawer and indorser.

145. Requirements as to presentment.

146. On what days presentment may be made.

147. Delay caused by previous presentment.

148. When presentment is excused.

149. When dishonored by non-acceptance.

150. Duty of holder where bill not accepted.

151. Rights of holder where bill not accepted.

§ 143. When presentment for acceptance must be made.—Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

Where bill is payable at a day certain.—Though the statute does not require that a bill payable at a day certain or at a fixed time after its date shall be presented for acceptance, yet the holder has the right to so present it, and if acceptance be refused, may treat the bill as dishonored. *Nat. Park Bank v. Saitta*, 127 App. Div. (N. Y.) 624. And where a bank receives such a bill for collection, its duty is to present the bill for acceptance without delay. For it is to the owner's interest that the bill should be so accepted, as only by accepting it does the drawee become bound to pay it,

and until such acceptance the owner has for his debtor only the drawer, and the step is one which a prudent man of business, ordinarily careful of his own interests, would take for his protection. *Allen v. Suydam*, 17 Wend. 368; *Nat. Park Bank v. Saitta*, 127 App. Div. (N. Y.) 624. A bill payable at a fixed period from its date may be presented for acceptance at any time. *Bachelor v. Priest*, 12 Pick. 399; *Oxford Bank v. Davis*, 4 Cush. 188.

When presentment for payment and not acceptance.—See *First Nat. Bank of Omaha v. Whitmore*, 177 Fed. Rep. 397. But compare *Wisner v. First Nat. Bank*, 220 Pa. St. 21; *First Nat. Bank of Murfreesboro v. First Nat. Bank of Nashville*, 154 S. W. Rep. (Tenn.) 965.

§ 144. When failure to present releases drawer and indorser.—Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

Rule at common law.—This section does not change the law. See *Robinson v. Ames*, 20 Johns. 146; *Gowan v. Jackson*, 20 Johns. 176; *Wallace v. Agry*, 4 Mason, 333; *Prescott Bank v. Coverly*, 7 Gray, 217; *Walsh v. Dort*, 23 Wis. 334; *Phoenix Ins. Co. v. Allen*, 11 Mich. 30; *Goupy v. Harden*, 7 Taunt. 397.

Delay in the mail.—A delay of the mail is a sufficient excuse for the omission to immediately present a bill for acceptance; and a presentation immediately after its reception is in time to charge the indorser. *Walsh v. Blatchley*, 6 Wis. 422.

§ 145. Requirements as to presentment.—Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

Variant reading.—In the New York Statute, by an error in engrossing, the word “his,” before the word “behalf” has been omitted.

Where bill addressed to two or more.—See Byles on Bills, 182.

Authority of agent to accept.—The holder may require the production by the agent of a clear and explicit authority from his principal to accept in his name, and without its production may treat the bill as dishonored. Daniel on Negotiable Instruments, section 487.

Where one of the drawees accepts.—But if one of the drawees accepts he will be bound by his acceptance. *Smith v. Melton*, 133 Mass. 369.

Where drawee is dead.—Presentment in such case is not necessary. See section 148. But as it will be convenient in most instances to have the bill duly protested, it is well to have some one designated to whom presentment can be made.

§ 146. On what days presentment may be made.—A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not

otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

Variant readings.—In Arizona, Kentucky and Wisconsin the last sentence is omitted; and in Colorado the last sentence reads: "When any day is in part a holiday, presentment for acceptance may be made during reasonable hours of the part of such day which is not a holiday." In North Carolina the word "otherwise" after the words "when Saturday is not" are omitted.

§ 147. Delay caused by previous presentment.—Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

§ 148. When presentment is excused.—Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill;
2. Where, after the exercise of reasonable diligence, presentment cannot be made;
3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

Where drawee is dead.—Prior to the statute there was some doubt as to the proper course in this case. See Daniel on Negotiable Instruments, section 1178.

Due diligence.—As to what will constitute due diligence, see *Sulsbacker v. Bank of Charleston*, 86 Tenn. 201.

§ 149. When dishonored by non-acceptance.—A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When presentment for acceptance is excused and the bill is not accepted.

§ 150. Duty of holder where bill not accepted.—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

§ 151. Rights of holder where bill not accepted.—When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.

See *Sterry v. Robinson*, 1 Day (Conn.), 11.

ARTICLE XIII.

PROTEST.

Section 152. In what cases protest necessary.

153. How protest made.

154. By whom protest made.

155. On what day to be made.

156. Where to be made.

157. Protest both for non-acceptance and non-payment.

158. Protest before maturity where acceptor insolvent.

159. When protest dispensed with.

160. Where bill lost, destroyed or wrongly detained.

§ 152. In what cases protest necessary.—Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

Necessity for protest.—See *Commercial Bank v. Varnum*, 49 N. Y. 269, 275; *Halliday v. McDougall*, 20 Wend. 81; *Dennistoun v. Stewart*, 17 How. (U. S.) 606; *Phoenix Bank v. Hussey*, 12 Pick. 483. Protest is indispensable, and the proof cannot be supplied in any other way. *Joseph v. Solomon*, 19 Fla. 623. There are several reasons why protest is required in such cases: (1) for the sake of uniformity in international transactions; (2) because it affords satisfactory evidence of dishonor to the drawer, who, from his residence abroad, might experience a difficulty in

making inquiries on the subject and be compelled to rely on the representations of the holder; (3) because, as foreign courts give credit to the acts of a public functionary, the protest affords the most satisfactory evidence to charge an antecedent party. *Byles*, 256.

Foreign and inland bills.—As to the distinction between foreign and inland bills, see section 129. As to protest of inland bills and promissory notes, see section 118.

Foreign bill—Measure of damage.—The damages recoverable by the payee of a negotiable foreign bill of exchange protested for non-payment against the drawer may be deemed to be made up as follows: (1) The face of the bill; (2) interest thereon; (3) protest fees; (4) re-exchange, i. e., the additional expense of procuring a new bill for the same amount payable in the same place on the day of dishonor; or a percentage in lieu of such re-exchange in jurisdictions where it is prescribed by statute. *Pavenstedt v. N. Y. Life Insurance Co.*, 203 N. Y. 91; *Bank of United States v. United States*, 2 How. (U. S.) 745, 764.

§ 153. How protest made.—The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

Annexing certificate to bill.—See *Fulton v. MacCracken*, 18 Md. 528.

Signature of notary.—The signature of the notary may be printed. *Bank of Cooperstown v. Woods*, 28 N. Y. 561; *Fulton v. MacCracken*, 18 Md. 528.

Seal of notary.—See *Donegan v. Wood*, 49 Ala. 242. In other cases it has been held that the official signature is all that is

required. *Huffaker v. National Bank*, 12 Bush. 293. When the court can perceive that a seal is attached thereto the protest is sufficiently authenticated; neither the seal nor the signature of the notary need be proved. *Barry v. Crowley*, 4 Gill (Md.) 194.

Time of presentment.—In the case of a note, the statement in a notarial certificate that it was presented on a certain day is not conclusive upon the parties, but evidence is admissible to show that presentment was also made on another day. *Reynolds v. Appleman*, 41 Md. 615.

Insufficient certificate.—A certificate of a notary which states that he presented a note for payment at a certain town and demanded payment, which was refused, but did not state to whom or at what place in the town it was presented, does not show such a presentation to the maker as will bind the indorser. *Duckert v. Von Lilienthal*, 11 Wis. 56.

Certificate as evidence.—The notarial certificate of protest is competent, without further proof. This has often been so held in respect to foreign bills. *Porter v. Judson*, 1 Gray, 175; *Pierce v. Indseth*, 106 U. S. 546; *Browne v. Philadelphia Bank*, 6 S. & R. 484; *Coruth v. Walker*, 8 Wis. 252. For this purpose the different States of the Union are deemed foreign to each other, so that the notarial certificate of protest under seal is good on mere production. *Townsley v. Sumrall*, 2 Pet. 170; *Halliday v. McDougall*, 20 Wend. 81; *Carter v. Burley*, 9 N. H. 558, 566; *Johnson v. Brown*, 154 Mass. 105, 106. The certificate is evidence of the facts therein set forth, although the notary, when examined, has no recollection of them. *Rosson v. Carroll*, 90 Tenn. 90; *Sherer v. Easton Bank*, 33 Pa. St. 134. And the entries of a deceased notary in his register are admissible. *Spann v. Baltzell*, 1 Fla. 301; *Porter v. Judson*, 1 Gray, 175. When a notary has neglected to keep a record of the notice which he has served on the non-payment of a note, his oral testimony is admissible to prove its contents. *Terbell v. Jones*, 15 Wis. 253. Where the protest is exclusively relied upon to prove the necessary facts to fix liability upon the parties to be affected, it must contain sufficient averments to show that everything requisite has been done on the part of the holder, or his agent, to authorize the demand upon the indorser. *People's Bank v. Brooke*, 31 Md. 7. For a case where the protest was insufficient, see *Mason v. Kilcourse*, 71 N. J. Law, 472, 473-474.

Of what facts certificate is evidence.—The statement in the certificate that notice of dishonor has been given is received as evidence of that fact. *Barry v. Crowley*, 4 Gill (Md.) 194; *Rosson v. Carroll*, 90 Tenn. 90; *Legg v. Vinal*, 165 Mass. 555; *Zollner v. Mofitt*, 226 Pa. St. 39. But the notary's certificate is not evidence of other collateral or independent facts it may contain, especially when such facts are not necessarily within the personal knowledge of the notary, or are of such a character as could not be established by his testimony if he were produced as a witness. *Weems v. Farmers' Bank*, 15 Md. 231. Thus, the statement that the party on whom the demand was made was "one of the administrators" of the acceptor, does not establish the facts of the death of the acceptor, and of the granting of letters of administration on his estate to such party. (*Id.*) So the words "after diligent search and inquiry to ascertain his whereabouts" are not admissible as evidence of such "diligent search and inquiry" having been made; for this is a conclusion of law which the notary could not legally draw or establish by his own testimony. *Reier v. Strauss*, 54 Md. 278. See also *Ricketts v. Pendleton*, 14 Md. 320; *Duckert v. Von Lilienthal*, 11 Wis. 56; *Sumner v. Bowen*, 2 Wis. 524; *Adams v. Wright*, 14 Wis. 403.

§ 154. By whom protest made.—Protest may be made by:

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

Variant readings.—In Washington the word "responsible" is substituted for "respectable" in the second subdivision.

Necessity for personal demand.—It would seem that, in the absence of any custom or usage on the subject, the presentment and demand must be made by the notary in person. *Commercial Bank v. Varnum*, 49 N. Y. 269, 275; *Ocean Nat. Bank v. Williams*, 102 Mass. 141.

Where notary is officer of bank owning paper.—A notary who is an officer of a bank may legally protest paper belonging to the bank. *Nelson v. First National Bank*, 69 Fed. Rep. 798; 29 U. S.

App. 554. And though he is also a stockholder in the bank. *Moreland's Assignee v. Citizens' Savings Bank*, 97 Ky. 211. And it has been held that the cashier of a bank who is a notary may legally protest his own note which has been discounted by the bank. *Dykman v. Northridge*, 1 App. Div. (N. Y.) 26.

Protest by resident.—See *Todd v. Neal's Administrator*, 49 Ala. 273.

§ 155. On what day to be made.—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

Noting.—The protest should be commenced, at least (and such an incipient protest is called noting), on the day on which acceptance or payment is refused; but it may be drawn up and completed at any time before the commencement of the suit, or even before or during the trial, and ante-dated accordingly. *Byles on Bills*, 257.

§ 156. Where to be made.—A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

Place of protest.—See *Daniel on Neg. Inst.*, section 935; *Byles on Bills*, 257.

Further presentment for payment.—See 3 *William IV. Ch.* 98; *Daniel on Neg. Inst.*, section 935; *Byles on Bills*, 258.

§ 157. Protest both for non-acceptance and non-payment.—A bill which has been protested for non acceptance may be subsequently protested for non-payment.

§ 158. Protest before maturity where acceptor insolvent.—Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

§ 159. When protest dispensed with.—Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

§ 160. Where bill is lost, or destroyed, or wrongly detained.—Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

Protest on copy of bill.—See *Hinsdale v. Miles*, 5 Conn. 331.

Where bill is lost.—Loss of the instrument does not excuse demand and protest. *Daniel on Negotiable Instruments*, section 1464. See also section 148.

ARTICLE XIV.

ACCEPTANCE FOR HONOR.

- Section 161. When bill may be accepted for honor.
 162. How acceptance for honor made.
 163. When deemed to be an acceptance for honor of the drawer.
 164. Liability of acceptor for honor.
 165. Agreement of acceptor for honor.
 166. Maturity of bill payable after sight accepted for honor.
 167. Protest required where bill accepted for honor.
 168. Presentment for payment to acceptor for honor—how made.
 169. When delay in making presentment is excused.
 170. Dishonor of bill by acceptor for honor.

§ 161. When bill may be accepted for honor.—Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

See Byles on Bills, 262-266.

§ 162. How acceptance for honor made.—An acceptance for honor *supra* protest must be in writing, and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

§ 163. When deemed to be an acceptance for honor of the drawer.—Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§ 164. Liability of acceptor for honor.—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Necessity for presentment to drawee.—The acceptor for the honor of the drawer cannot maintain an action thereon against him without proof of its presentment to the drawee and non-acceptance or non-payment by him, and notice thereof to the drawer. *Baring v. Clark*, 19 Pick. 220.

§ 165. Agreement of acceptor for honor.—The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

§ 166. Maturity of bill payable after sight and accepted for honor.—Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§ 167. Protest required where bill accepted for honor.—Where a dishonored bill has been accepted for honor

supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

§ 168. Presentment for payment to acceptor for honor—how made.—Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.

Variant readings.—In North Carolina the words “in this chapter specified” are substituted for the number of the section. The number, of course, varies in the different states. In the commissioners’ draft it was 104; and this is the number in many of the states.

Time of presentment.—Doubts having arisen as to the day when the bill should be again presented to the acceptor for honor, or referee in case of need, for payment, the 6 and 7 Will. 4, c. 58, enacted that it should not be necessary to present, or in case the acceptor for honor or referee live at a distance, to forward for presentment, till the day following that on which the bill becomes due. Byles on Bills, 263.

§ 169. When delay in making presentment is excused.—The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

§ 170. Dishonor of bill by acceptor for honor.—When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

ARTICLE XV.

PAYMENT FOR HONOR.

- Section 171. Who may make payment for honor.
172. Payment to be attested by notary.
173. Declaration before payment for honor.
174. Preference of parties offering to pay for honor.
175. Effect of payment—subsequent parties—rights of payer for honor.
176. Where holder refuses to receive payment *supra* protest.
177. Payer entitled to bill and protest.

§ 171. Who may make payment for honor.—Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

See Byles on Bills, 267-269; Daniel on Neg. Inst., section 1254.

§ 172. Payment to be attested by notary.—The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

Rule at common law.—See Byles on Bills, 267; Daniel on Neg. Inst., section 1258.

Payment by stranger.—A stranger to the drawer and indorser of a non-accepted bill may intervene *supra* protest to pay the same for the honor of the indorser or drawer. *Konig v. Bayard*, 1 Pet. 250. And it is no objection to this intervention that it has been

done at the request and under the guarantee of the drawer who had refused acceptance or payment.

§ 173. Declaration before payment for honor.—The notarial act of honor must be founded on a declaration made by the payer for honor, or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

§ 174. Preference of parties offering to pay for honor.—Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

§ 175. Effect of payment — subsequent parties — rights of payee for honor.—Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

See Daniel on Neg. Inst., section 1255.

§ 176. Where holder refuses to receive payment *supra protest*.—Where the holder of a bill refuses to receive payment *supra protest*, he loses his right of recourse against any party who would have been discharged by such payment.

§ 177. Payer entitled to bill and protest.—The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

ARTICLE XVI.

BILLS IN A SET.

Section 178. All the parts constitute one bill.

179. Rights of holders where different parts are negotiated.

180. Liability of holder who indorses two or more parts of a set to different persons.

181. Acceptance of bills drawn in sets.

182. Payment by acceptor of bills drawn in sets.

183. Effect of discharging one of a set.

§ 178. All the parts constitute one bill.—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

See Byles on Bills, 387; Daniel on Neg. Inst., section 113; *Durkin v. Cranston*, 7 Johns. 442. It is immaterial that the payee received only the second part of the bill, as all the parts constitute one bill. *Caras v. Thalmann*, 138 App. Div. (N. Y.) 297.

§ 179. Rights of holders where different parts are negotiated.—Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

See Byles on Bills, 389; *Walsh v. Blatchley*, 6 Wis. 422.

§ 180. Liability of holder who indorses two or more parts of a set to different persons.—Where the holder

of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

See *Holdsworth v. Hunter*, 10 C. B. 449; *Byles on Bills*, 389.

§ 181. Acceptance of bills drawn in sets.—The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

See *Holdsworth v. Hunter*, 10 C. B. 449; *Byles on Bills*, 389. Either of the set may be presented for acceptance, and if not accepted a right of action arises, upon due notice, against the indorser. *Dounes & Co. v. Church*, 13 Peters, 205; *Walsh v. Blatchley*, 6 Wis. 422, 425.

§ 182. Payment by acceptor of bills drawn in sets.—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

See *Byles on Bills*, 389.

§ 183. Effect of discharging one of a set.—Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

Variant readings.—In Wisconsin two sections, under the heading *Damages on Bills*, are inserted at this place, as follows: "Section 1682. Whenever any bill of exchange drawn or indorsed within this state and payable without the limits of the United States shall be duly protested for non-acceptance or non-payment

the party liable for the contents of such bill shall, on due notice, and demand thereof, pay the same at the current rate of exchange at the time of the demand and damages at the rate of five per cent. upon the contents thereof, together with interest on the said contents, to be computed from the date of the protest; and said amount of contents, damages and interest shall be in full of all damages, charges and expenses. Section 1683. If any bill of exchange drawn upon any person or corporation out of this state, but within some state or territory of the United States, for the payment of money shall be duly presented for acceptance or payment and protested for non-acceptance or non-payment the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay said bill with legal interest according to its tenor and five per cent. damages, together with costs and charges of protest."

Rule at common law.—This section does not change the law. See Byles on Bills, 338.

Discharge of drawee.—Where the drawee is discharged the whole bill is discharged. *Caras v. Thalmann*, 138 App. Div. (N. Y.) 297. So, where one of the set is discharged. *Casper v. Kuhne*, 159 App. Div. (N. Y.) 389, 393.

ARTICLE XVII.

PROMISSORY NOTES AND CHECKS.

Section 184. Promissory note defined.

185. Check defined.

186. Within what time a check must be presented.

187. Certification of check—effect of.

188. Effect where holder of check procures it to be certified.

189. Check does not operate as an assignment.

§ 184. Promissory note defined.—A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

Non-negotiable notes—Presumption as to consideration.—This section makes a change in the law of New York as regards the presumption of consideration in the case of non-negotiable notes. The terms of the former New York statute included a note payable to a person named therein without words of negotiability. *Carnwright v. Gray*, 127 N. Y. 92. But as that statute has been repealed, and as the provisions of the Negotiable Instruments Law apply only to negotiable promissory notes, it is now necessary to prove consideration in actions upon non-negotiable notes. *Deyo v. Thompson*, 53 App. Div. (N. Y.) 12; *St. Lawrence Nat. Bank v. Watkins*, 153 Id. 551. The rules on the subject have differed in the different States. See *Daniel on Negotiable Instruments*, section 163. In Connecticut the act has made no change in the law; for the rule in that State has been that a non-negotiable note does not import a consideration. *Bristol v. Warner*, 19 Conn. 17.

Recital "value received" in non-negotiable note.—The recital "value received" in the body of a non-negotiable note is an *admission* that the instrument was issued for a sufficient consideration. *Owens v. Blackburn*, 161 App. Div. (N. Y.) 827; *Hamilton v. Hamilton*, 127 Id. 871.

Certificate of deposit—Coupons.—A certificate of deposit in the ordinary form is a negotiable promissory note within the meaning of this section. *Forrest v. Safety Banking & Trust Co.*, 174 Fed. Rep. 345. See also *Jensen v. Wilself*, 36 Nev. 37; *Curran v. Witter*, 68 Wis. 16; *Maxwell v. Agnew*, 21 Fla. 154. And so are coupons payable to bearer. *Trustees of the I. I. Fund v. Lewis*, 34 Fla. 424.

Where note is drawn to maker's own order.—Under the statute, a maker indorsing a note payable to his own order incurs a separate and distinct liability as indorser, and may be sued as such. *National Exchange Bank v. Lubrano*, 29 R. I. 64. But if the note is wholly void, as, for example, where it has been given to secure an usurious loan, the maker's indorsement adds nothing to the strength of the paper, since he is only warranting his own contract. *Sabine v. Paine*, 166 App. Div. (N. Y.) 9. For other cases applying this provision of the section, see *Sherman v. Goodwin*, 12 Ariz. 42; *Alexander v. Hazelrigg*, 123 Ky. 677; *Hibernia Bank & Trust Co. v. Dresser*, 132 La. 532.

Party indorsing before maker.—Under this section it is no defense to an indorser of a note drawn to the order of the maker that he signed his name on the back of the paper before it was indorsed by the maker. *Yonkers National Bank v. Mitchell*, 156 App. Div. (N. Y.) 318.

Former law in New York.—The former statute of New York provided that "notes made payable to the order of the maker thereof . . . shall if negotiated by the maker, have the same effect, and be of the same validity, as against the maker and all persons having knowledge of the facts as if payable to bearer," and hence the indorsement of the maker was not required. 1 Rev. Stat. 768. See *Irving Nat. Bank v. Alley*, 79 N. Y. 536.

Oral conditions.—The maker will not be allowed to prove an oral condition that would defeat, or contradict the terms of, the note, as, for example, that he was not to pay it unless he should receive the amount from another person. *Torpey v. Tebo*, 184

Mass. 307. Or that it was to be paid by installments. *Cauley v. Dunn*, 167 N. C. 32. Or that certain moneys were to be credited on it. *Orange Co. Trust Co. v. Miller*, 149 App. Div. (N. Y.) 292. So, one maker of a joint and several note may not prove an oral agreement that each maker should be liable for a proportionate part. *Woods v. Finley*, 153 N. C. 497. See also *Pitt v. Little*, 58 Wash. 355. Nor may the maker show that he was to be liable as indorser. *Lumbermen's Nat. Bank v. Campbell*, 61 Ore. 123. But an agreement to renew is a collateral agreement, which does not contradict the note. *Keith v. Radway*, 221 Mass. 515.

Pleading.—In an action upon a promissory note payable to the order of the maker, it is necessary to allege that the note was indorsed by the maker. *Edelman v. Rams*, 58 Misc. (N. Y.) 561. An allegation in a complaint in an action upon a non-negotiable note that the instrument was executed and delivered for a "valuable consideration" is a statement of fact, and not a conclusion of law. *St. Lawrence Nat. Bank v. Watkins*, 153 App. Div. 551. See note to section 24.

§ 185. Check defined.—A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

When check payable upon demand.—Unless a specific date of payment is mentioned, the check is payable upon demand under section 7. *Riddle v. Bank of Montreal*, 145 App. Div. (N. Y.) 207.

Distinguishing characteristic.—One of the characteristics which distinguish a check from a bill of exchange is that a check is always drawn on a bank or banker. *Harris v. Clark*, 3 N. Y. 93, 115; In the *Matter of Brown*, 2 Story's Rep. 502. See also *Bull v. Bank of Kasson*, 123 U. S. 105; *Rogers v. Durant*, 140 U. S. 298; *Espy v. Bank of Cincinnati*, 18 Wall. 620; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Chapman v. White*, 6 N. Y. 412; *Harker v. Anderson*, 21 Wend. 373; *Murray v. Judah*, 6 Cow. 484; *Cruger v. Armstrong*, 3 Johns. 5; *Ridgeley Bank v. Patton*, 109 Ill. 484; *Harrison v. Nicollet Nat. Bank*, 41 Minn. 489; *Northwestern Coal Co. v. Bowman*, 69 Iowa, 152; *Planters' Bank v. Keese*, 7 Heisk. 200; *Blair v. Wilson*, 28 Gratt. 170; *Dodd v. Jette*, 10 Oregon, 31; *Hopkinson v. Forster*, L. R. 18 Eq. 74. For cases applying the

statute, see *Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182; *Boswell v. Citizens' Savings Bank*, 123 Ky. 485.

Cashier's Checks.—Under the statute cashier's checks, whether certified or otherwise, are classed with bills of exchange payable on demand. *Singer Mfg. Co. v. Summers*, 143 N. C. 103.

Draft not payable immediately.—There has been some conflict in the decisions as to whether a draft upon a bank not payable immediately was a check or bill of exchange. The latter view was adopted in New York. *Bowen v. Newell*, 8 N. Y. 190; 13 N. Y. 390. To the same effect also are the following cases: *Ivory v. Bank of the State*, 36 Mo. 475; *Harrison v. Nicollet National Bank*, 41 Minn. 488; *Georgia National Bank v. Henderson*, 46 Ga. 496; *Minturn v. Fisher*, 4 Cal. 36; *Morrison v. Bailey*, 5 Ohio St. 13. *Contra*: *Champion v. Gordon*, 70 Pa. St. 474; *Westminster Bank v. Wheaton*, 4 R. L. 30; *In re Brown*, 2 Story, 502. In all of these cases the particular question presented was whether the instrument was entitled to grace. But now that grace has been abolished the distinction is of little, if any, practical importance.

Necessity for presentment and notice.—Presentment and notice of dishonor are necessary in order that the holder may recover of the drawer. *Herker v. Anderson*, 21 Wend. 372; *Dolph v. Rice*, 18 Wis. 397. But unless the check answers the description of a foreign bill protest is not required. *Wittich v. First Nat. Bank of Pensacola*, 20 Fla. 843. See section 118.

§ 186. Within what time a check must be presented.
—A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

Variant readings.—In Illinois, after the words "reasonable time after its issue" the following is interpolated: "and notice of dishonor as provided for in the case of bills of exchange."

Rights of indorsers.—It will be noted that this section applies only to the drawer. The rights of indorsers are governed by section 71. See note to that section. As the drawer can sustain a loss only by the failure of the bank, this section will apply only

in such cases; but delay in presentment may result in loss to an indorser by the insolvency of the drawer or the withdrawal of the deposit.

Where drawer is not damaged by delay.—The holder's laches in presenting a check for payment constitutes no defense in an action against the drawer unless he is damaged by the delay, and then only to the extent of his loss. A check purports to be made upon a deposit to meet it, and presupposes funds of the drawer in the hands of the drawee. But if the drawer has no such funds at the time of drawing his check, or subsequently withdraws them, he commits a fraud upon the payee, and can suffer no loss or damage from the holder's delay in respect to presentment or notice. In such case he is liable and cannot insist upon a formal demand or notice of non-payment. *First National Bank of Portland v. Linn County National Bank*, 30 Oregon 296; *Industrial Bank of Chicago v. Bowes*, 165 Ill. 70.

Rule as respects indorsers.—But while as between the holder and drawer of a check, presentment may be made at any time, and delay in presentment does not discharge the drawer, unless loss has resulted to him, a different rule obtains as between holder and indorser. The holder, on accepting the check, assumes the obligation to present the same for payment within the time prescribed by law, and if payment is refused to give notice of non-payment. A failure to do this discharges the indorser from liability as such irrespective of any question of loss or injury. *Carroll v. Sweet*, 128 N. Y. 19; *Smith v. Janes*, 20 Wend. 192.

What is a reasonable time.—The general rule is that the reasonable time allowed for presentment ends with the next day after the delivery of the check. *Dehoust v. Lewis*, 128 App. Div. (N. Y.) 131; *Smith v. Janes*, 20 Wend. 192; *Carroll v. Sweet*, 128 N. Y. 19, 22; *Turner v. Kimble*, 37 Okla. 92. For instances of unreasonable delay see *Industrial Trust Title and Savings Co. v. Weakley*, 103 Ala. 458; *Gifford v. Hardell*, 88 Wis. 538; *First National Bank of Wymore v. Miller*, 43 Neb. 791; *Comer v. Dufour*, 95 Ga. 376; *Grange v. Reigh*, 93 Wis. 552; *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105; *Gregg v. Beane*, 69 Vt. 22; *Holmes v. Roe*, 62 Mich. 199. For instances of presentment in due time, see *Loux v. Fox*, 171 Pa. St. 68; *Willis v. Finley*, 173 Pa. St. 28; *First Nat. Bank v. Buckhannon Bank*, 80 Md. 475; *Lloyd v. Osborne*, 92 Wis.

93; *Bell v. Alexander*, 21 Gratt. 1; *Purcell v. Ellemong*, 22 Gratt. 739. For cases applying this section of the statute, see *Gordon v. Levine*, 194 Mass. 418, 421; *Aebi v. Bank of Evansville*, 124 Wis. 73, 77; *Citizens' Bank v. First Nat. Bank*, 135 Iowa, 605; *Cox v. Citizens' State Bank*, 73 Kans. 789; *Moskowitz v. Deutsch*, 46 Misc. (N. Y.) 603; *Singer Manufacturing Co. v. Summers*, 143 N. C. 103; *Asbury v. Taube*, 151 Ky. 142.

Where check is negotiated.—The fact that the payee indorses the check to a third person does not extend the time for presentment as between the drawer and the payee. *Dehoust v. Lewis*, 128 App. Div. (N. Y.) 131. But as respects an indorser, section 71 applies, and presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. *Columbian Banking Co. v. Bowen*, 134 Wis. 218; *Plover Savings Bank v. Moodie*, 135 Iowa, 685. See note to section 71. The reason for this distinction is obvious. The drawer intends that the check shall be presented to the bank for payment promptly, and presentment ought not to be delayed at his risk. But when the payee, instead of presenting the check for payment, negotiates it and puts it into circulation, he cannot complain if delay results from his own act.

Death of drawer.—The payment of a check made by a bank after the death of the depositor, but before the bank has received knowledge of that fact, is a valid payment, and the bank is not liable for the amount to the personal representative of the depositor. *Glennan v. Rochester Trust & S. D. Co.*, 209 N. Y. 12; *Rogerson v. Ladbroke*, 1 Bing. 93; *Tate v. Hilbert*, 2 Ves. Jun. 112. The original draft of the Negotiable Instruments Law submitted to the commissioners contained a provision (which was taken from the statute of Massachusetts) as follows: "The death of the drawer does not operate as a revocation of the authority to pay a check, if the check is presented for payment within ten days from the date thereof." But it was thought by the conference of commissioners that this would be objected to in some of the States because of the effect it might have on the estates of decedents.

Payment through Clearing House.—The payment of a Clearing House balance is not a payment of any particular check, and does not become so until the time within which the check may be returned has expired. *Hentz v. Nat. City Bank*, 159 App. Div.

(N. Y.) 743; *Merchants' Nat. Bank v. Nat. Bank of the Commonwealth*, 139 Mass. 513. And while the adjustment of balances by the clearing-house constitutes a sort of tentative or provisional payment, that adjustment occurs without an opportunity to the members to examine the items, and regardless of whether the checks are good; and, therefore, the question of payment is not, and cannot be, ultimately decided until the bank upon which the check is drawn has had an opportunity to examine the checks at its banking house. *Columbia-Knickerbocker Trust Co. v. Miller*, 215 N. Y. 191.

Certificate of deposit.—As to the time within which a certificate of deposit should be presented for payment, see *Pierce v. State Nat. Bank*, 215 Mass. 18.

§ 187. Certification of check — effect of.—Where a check is certified by the bank on which it is drawn the certification is equivalent to an acceptance.

Rule at common law.—This section makes no change in the law. See *Merchants' Bank v. State Bank*, 10 Wall. 604; *Cooke v. State Nat. Bank*, 52 N. Y. 96; *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank*, 16 N. Y. 125.

Effect of certification.—Where a bank certifies a check at the request of the payee, the effect is the same as though the funds had been paid out to him and deposited to his own credit, and hence the bank may not refuse to pay the check upon the ground that it was procured from the drawer by fraud. *Times Square Auto. Co. v. Rutherford Nat. Bank*, 77 N. J. L. 649. But where the certification is not made at the instance of the payee, or of a holder in due course, but at the instance of one who has induced the negotiation of the instrument by fraud, and who has not been authorized to represent the payee, it is not binding upon the payee. *Anglo-South Am. Bank v. Nat. City Bank*, 161 App. Div. (N. Y.) 268.

When certification become effective.—When the certification is made at the instance of the drawer, it does not become effective until the delivery of the check to the payee. *Anglo-South Am. Bank v. Nat. City Bank*, 161 App. Div. (N. Y.) 268, 274.

Necessity for writing.—Section 132 applies to an acceptance by a bank as well as by any other drawee, and hence it must be in writing; and an action cannot be maintained against the bank on an oral promise to pay. See note to section 132, and cases there cited.

Signature of indorser.—The certification does not admit the genuineness of the indorser's signature. *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296.

Check delivered without indorsement of payee.—Where a check delivered without the indorsement of the payee is afterwards certified by the bank, the holder may recover of the bank, though he is unable to obtain the indorsement of the payee. *Meuer v. Phenix Nat. Bank*, 94 App. Div. (N. Y.) 331.

Drawer's right of set-off.—Where the bank has certified a check it may not refuse to pay the same in order that the drawer may enforce a right of set-off against the payee. *Carnegie Trust Co. v. First Nat. Bank*, 213 N. Y. 301.

§ 188. Effect where the holder of check procures it to be certified.—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

Reason for the rule.—When the holder, instead of insisting upon immediate payment, has the check certified, he, in effect, causes the funds to be withdrawn from the control of the depositor, and leaves them with the bank for his own accommodation; and it would be unjust that the money should be left in the bank at the risk of the drawer. *Davenport v. Palmer*, 152 App. Div. (N. Y.) 761; *Lyons v. Union Exchange Nat. Bank*, 150 Id. 493; *Bank v. Carter*, 88 Tenn. 279. The effect of the certification in such case is to create a new contract between the holder and drawee. *Anglo-South Amer. Bank v. Nat. City Bank*, 161 App. Div. (N. Y.) 268, 275.

Where drawer has check certified.—But where the drawer causes the check to be certified before delivery, the same reason does not exist for holding him discharged from liability; and in such case

the certification operates merely as an assurance that the check is genuine, and the certifying bank becomes bound with the drawer. *Davenport v. Palmer*, 152 App. Div. (N. Y.) 761, 763; *Born v. First Nat. Bank*, 123 Ind. 78; *Cincinnati Oyster & Fish Co. v. Nat. Lafayette Bank*, 51 Ohio St. 106; *Andrews v. German Nat. Bank*, 9 Heisk. 211. See also cases cited above. And this is so though the drawer has the check certified at the request of the payee. *Randolph Nat. Bank v. Hornblower*, 160 Mass. 401.

Where bank taking check as deposit has it certified.—This section applies where a bank, which has taken its customer's check on another bank and given him credit therefor, has the check certified by the drawee. *Lyons v. Union Exchange Nat. Bank*, 150 App. Div. (N. Y.) 403.

Where name of payee changed in certified check.—An attorney of a mortgagee stated to the mortgagor that a certified check would be received in payment of the mortgage, and when a certified check was offered in payment, demanded that it should be made payable to himself as well as to the mortgagee, which was done, and the change noted on the books of the bank: *Held*, that the case was not within this section, and that the drawer was not discharged. *Davenport v. Palmer*, 152 App. Div. (N. Y.) 761.

Where bank has cashed check.—Where a bank has cashed a check upon a forged indorsement, the payee cannot maintain an action against such bank to recover the money collected by it upon the check. *Tibby Bros. Glass Co. v. Farmers & Mfgs. Bank of Sharpsburg*, 220 Pa. 1.

Suit in equity.—A bank is not liable on equitable grounds to the holder for the amount of an unaccepted check which it has refused to pay though the holder acquired the check on the oral representation of the bank that the drawer had funds on deposit to meet the check, and that the check was good, and that the holder might safely take it in payment for goods sold the drawer. *Rambo v. First Nat. State Bank of Argentine*, 88 Kans. 257.

§ 189. Check does not operate as an assignment.—A check of itself does not operate as an assignment of

any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

Rule at common law.—Prior to the statute there was considerable conflict in the authorities. The rule adopted in the act is supported by the weight of authority. See *Bank v. Millard*, 10 Wall. 152; *Bank v. Schuyler*, 120 U. S. 511; *Florence Mills Co. v. Brown*, 124 U. S. 385; *First Nat. Bank v. Whitman*, 94 U. S. 343, 344; *St. L. & S. F. Ry. Co. v. Johnston*, 133 U. S. 566; *Attorney-General v. Continental Life Insurance Co.*, 71 N. Y. 325, 330; *First Nat. Bank of Union Mills v. Clark*, 134 N. Y. 368; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324; *Maginn v. Dollar Savings Bank*, 131 Pa. St. 362; *Saylor v. Bushong*, 100 Pa. St. 27; *Covert v. Rhodes*, 48 Ohio St. 66; *Cincinnati H. & D. R. R. Co. v. Metropolitan Nat. Bank*, 54 Ohio St. 60; *Pickle v. People's Nat. Bank*, 88 Tenn. 380; *Boetcher v. Colorado Nat. Bank*, 15 Col. 16; *Hopkinson v. Foster*, L. R. 18 Eq. 74. *Contra*, *Fonner v. Smith*, 31 Neb. 107; *Munn v. Burch*, 25 Ill. 35; *Bank v. Patton*, 109 Ill. 479, 485; *Nat. Bank of America v. Nat. Bank of Ill.*, 164 Ill. 503.

Assignment by agreement.—But while the mere making and delivery of a check in the ordinary course of business does not operate as an assignment of the fund, it is yet competent for the parties to create such an assignment by a clear agreement or understanding, oral or otherwise, in addition to the giving of the check, that such shall be the effect of the transaction. *Fourth Street National Bank v. Yardley*, 165 U. S. 634; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83, 88.

Application of the statute.—For cases applying this section, see *Hentz v. Nat. City Bank*, 159 App. Div. (N. Y.) 743; *Rambo v. First State Bank of Argentine*, 88 Kans. 257; *Baltimore & Ohio R. R. Co. v. First Nat. Bank*, 102 Va. 753; *Van Buskirk v. State Bank*, 35 Colo. 69; *Tilby Bros. Glass Co. v. Farmers & Mechanics' Bank*, 220 Pa. St. 1.

§ 326. Recovery of forged check.—No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment,

such depositor shall notify the bank that the check so paid was forged or raised.

Origin of the section.—This section was added by Laws of New York, 1904, ch. 287. It does not seem to be germane to the Negotiable Instruments Law, and would more properly have been enacted as an amendment to the Banking Law. Similar statutes, but varying in their terms, have been enacted in Wisconsin, California, South Dakota, Michigan, Washington, Oregon, New Jersey, Iowa, Montana, North Carolina, North Dakota, Wyoming, Idaho, Kansas, Maine, Minnesota, Ohio, Oregon, Louisiana, Massachusetts and Rhode Island, but not as amendments to the Negotiable Instruments Law.

Pleading section as defense.—This section establishes a general rule of substantive law, and is available as a defense though not specially pleaded. *Shattuck v. Guardian Trust Co.*, 204 N. Y. 200.

ARTICLE XVIII.*

NOTES GIVEN FOR PATENT RIGHTS AND FOR A SPECULATIVE CONSIDERATION.

Section 330. Negotiable instruments given for patent rights.

331. Negotiable instruments given for a speculative consideration.

332. How negotiable bonds are made non-negotiable.

§ 330. Negotiable instruments given for patent rights.—A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words “given for a patent right” prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article.

Source of the section.—This section is taken without change from Laws N. Y. 1877, ch. 65, section 1. Similar statutes exist in other States. See Laws of Pa. 1872, 60.

Constitutionality of section.—This section is not in contravention of the Constitution of the United States and the Acts of Congress which secure to a patentee for a limited time “the full and exclusive right and liberty of making, using and vending to others to be used” his invention or discovery. *Herdie v. Roessler*, 109

*This article appears only in the New York and Ohio acts.

N. Y. 127; *Tod v. Wick*, 36 Ohio St. 370; *Haskell v. Jones*, 86 Pa. St. 173; *Shires v. Commonwealth*, 120 Pa. St. 368; *Breckhill v. Randall*, 102 Ind. 528; *New v. Walker*, 108 Ind. 365.

Where statement not omitted.—If the note does not contain the statement required by this section it is unenforceable between the parties; but, if negotiable paper, it is valid in the hands of a holder in due course. *New v. Walker*, 108 Ind. 365; *Kniss v. Holbrook*, 16 Ind. App. 229; *Harmon v. Hagerty*, 88 Tenn. 705. If the holder had knowledge of the facts the paper is void in his hands, though he paid value for it, and acquired it before maturity. *Benton v. Sakyto*, 84 Neb. 808.

§ 331. Negotiable instrument for a speculative consideration.—If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, “given for a speculative consideration,” or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

Source of section.—This section was taken without change from Laws N. Y. 1874, ch. 262, section 1.

Other statutes requiring statement of condemnation.—It has become quite the custom for the States to pass laws requiring notes given in various transactions to disclose the nature of the con-

sideration, and one State legislature has gone so far as to require that this part of the contract shall be written in red ink. In construing one of these statutes, the Supreme Court of Wisconsin has said: "The sales of lightning rods, patent rights, and stallions, were evidently considered by the Legislature as transactions, presenting quite similar opportunities and inducements for overreaching by fraudulent methods, and so it was determined that they might well be controlled by the same restrictive provisions; but there is absolutely no indication either in the law itself or in the nature of things that the restriction upon the free sale of stallions or lightning rods was considered in any way dependent upon or compensated by the restriction upon the sale of patent rights. It is not claimed that such a restriction upon the freedom of sales of stallions is unreasonable or unwarranted. The records of this court in recent years seem to show that such transactions present peculiarly seductive opportunities for misrepresentation and fraud even surpassing those presented by the traditional horse trade." *Quiggle v. Herman*, 131 Wis. 379. For other cases construing similar statutes, see note to section 57.

§ 332. How negotiable bonds are made non-negotiable.—The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this State, but not registered in pursuance of any State law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

Source of section.—This section was taken without change from Laws N. Y. 1871, ch. 81; Laws N. Y. 1873, ch. 595.

ARTICLE XIX.*

LAWS REPEALED; WHEN TO TAKE EFFECT.

Section 340. Laws repealed.

341. When to take effect.

§ 340. **Laws repealed.**—Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is hereby repealed.

Variant readings.—In most of the states this section reads: “All acts and parts of acts inconsistent with this act are hereby repealed.” In some of the states the section is omitted.

§ 341. **When to take effect.**—This chapter shall take effect on the first day of October, eighteen hundred and ninety-seven.

Variant readings.—The date mentioned in the section varies, of course, in the different states. In some states the section is omitted. In Arkansas the section reads: “This Act shall not affect any instrument or written contract now in existence, or coming into existence before it takes effect.”

* The sections in this article are printed as they appear in the New York Statute.

SCHEDULE OF LAWS REPEALED.*

Revised Statutes.		Sections.
R. S., pt. II., ch. 4, tit. II.....		All.....
Laws of Chapter. Sections.		
1778.....	33	All.
1794.....	48.....	All.
1801.....	44.....	All.
1819.....	34.....	All.
1823.....	216.....	All.
1826.....	17.....	All.
1828.....	20.....	15, ¶ 30 (2d meet.)
1828.....	20.....	1, ¶¶ 51, 272, 393, 460 (2d meet.)
1835.....	141.....	All.
1857.....	416.....	All.
1865.....	309.....	All.
1870.....	438.....	All.
1871.....	84.....	All.
1873.....	595.....	All.
1877.....	65.....	1, 3.
1887.....	461.....	All.
1888.....	229.....	All.
1891.....	262.....	1.
1894.....	607.....	All.
1897.....	612.....	All.
1897.....	613.....	2, 3.
1898.....	336.....	All.
1904.....	287.....	All.

*This schedule comprises only the New York statutes.

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